

San Francisco Law Library

436 CITY HALL

No. 148049

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

No. 12761

United States
Court of Appeals
for the Ninth Circuit.

JACK BORCICH, ANDREW VILICICH and
BORTUL ZANKICH, Co-Owners of the Oil
Screw Marsha Ann,

Appellants,

vs.

JOSEPH ANCICH, JOHN KAIZA, ANTON
BOGDANOVICH, PETER SVORINICH,
MARTIN MISKULIAN, RAY ZUKOWSKI,
WILLIAM T. DECKER, GEORGE KOR-
GAN, SAM BILAS, W. H. HOOPES, NICK
MILOSEVICH, GEORGE KORGAN and
SAM BILAS,

Appellees.

Apostles on Appeal
In Two Volumes

Volume II
(Pages 319 to 585)

Appeal from the United States District Court,
Southern District of California,
Central Division.



No. 12761

United States
Court of Appeals
for the Ninth Circuit.

JACK BORCICH, ANDREW VILICICH and
BORTUL ZANKICH, Co-Owners of the Oil
Screw Marsha Ann,

Appellants,

vs.

JOSEPH ANCICH, JOHN KAIZA, ANTON
BOGDANOVICH, PETER SVORINICH,
MARTIN MISKULIAN, RAY ZUKOWSKI,
WILLIAM T. DECKER, GEORGE KOR-
GAN, SAM BILAS, W. H. HOOPES, NICK
MILOSEVICH, GEORGE KORGAN and
SAM BILAS,

Appellees.

Apostles on Appeal
In Two Volumes
Volume II
(Pages 319 to 585)

Appeal from the United States District Court,
Southern District of California,
Central Division.

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

1675

December 13, 1949. 1:30 P.M.

The Clerk: 8960, Ancich v. Marsha Ann; for further trial.

Mr. Shallenberger: Mr. Sims, will you resume the stand?

LOUIS SIMS

called as a witness by the intervening libelants, having been previously sworn, resumed the stand and testified further as follows:

Mr. Shallenberger: May I have the last question and answer, Miss Reporter?

(The record was read by the reporter.)

Direct Examination

(Continued)

By Mr. Shallenberger:

Q. Now, Mr. Sims, showing you the report of February 28, 1949, which you have already identified as the report made by you after the job was completed, and directing your attention to the second page thereof, will you, using that if necessary to refresh your memory—in other words, Mr. Sims, I don't want you to read from that, but if you need to refresh your memory by it you may do so—will you tell us what damage you found aboard the vessel Bear?

A. Well, starting with the starboard side, in the [257] way of this damaged area——

Q. Keep your voice up, please.

A. Starting with the starboard side and the

(Testimony of Louis Sims.)

damaged area there, the bulwarks had been broken inboard, and the planking cracked in the bulwarks.

Also the main guard had been crushed, the main guard consisting of hardwood facing and two inner pads, the sheer strake directly below the main guard.

Q. Just a minute; may we stop, and will you explain what a "strake" is?

A. A strake is a course of planking; and directly inboard of that, on the inner side of the frames, is the vessel's main clamps, which runs longitudinally the full length of the vessel. That consisted of a 4½ by 10-inch Douglas fir timber. That had been broken.

The two main deck beams in the way of the damage had had the ends crushed, and the beams themselves were split.

The vessel's main decking, through from the starboard to the port side, was wracked and set to port.

Q. Just a moment, Mr. Sims. What do you mean by "wracked"?

A. Well, it had been twisted. It had been twisted by the force of the collision, and the main decking, of course, is spiked on to the deck beams, and when the ends of these two beams, in the way of damage to the guard and the [258] bulwarks, when it had hit the end of these beams it had forced them toward the port side of the vessel, and consequently the decking that was spiked on to your deck beams was also pushed over and, in the motion of pushing it over, it had strained the fastenings.

Q. And that was from starboard to the port side?

(Testimony of Louis Sims.)

A. Yes, sir, that is correct.

Q. In other words, all the way across the vessel?

A. That is right. The inner side of the vessel, over what is known as the ceiling wood on the inside of the frames, in the fish holds there are fitted hanging knees; and the hanging knees, there are three——

Q. Will you state what a “hanging knee” is? Will you describe it, and its purpose in the vessel?

A. Well, a hanging knee acts as a stiffener or a brace, and it is triangular in shape, generally being fitted beneath the main deck beam and against the ceiling wood on the inner side of the skin of the ship; and its purpose is to stiffen between the deck beams or between the main decking and the skin of the ship.

Q. Proceed.

A. The three hanging knees on the port side had been strained.

Q. On which side?

A. On the port, directly opposite the damaged area. [259] Three of them on the port, and there were two of them on the starboard side.

There was openings on the starboard side of the toes, and the foot of the frame, and there was openings at the knees on the port side, in the heel of the knees, where the entire structure of the vessel had been wracked out of shape.

Also the hatch coaming was strained.

Another thing was, when——

The Court: What is that?

(Testimony of Louis Sims.)

Mr. Shallenberger: Hatch coaming.

The Witness: The framing——

Mr. Roethke: Was that question answered? The Judge asked him what “hatch” was?

Mr. Shallenberger: The judge did not understand the word.

Mr. Roethke: Excuse me.

The Witness: The frames, also, along, along the starboard side and along the port side, were broken on a line with the lower heel of the hanging knees.

The Court: What do you mean by “frames”?

The Witness: The vessel frames, the frames which form the shape of the vessel, to which the planking is nailed.

Q. (By Mr. Shallenberger): You may proceed on.

A. There were also four strakes of ceiling wood on the starboard side of the fish hold that was broken. [260]

Now, on the port side there were frames broken there also, on a line with the bottom ends of the hanging knees, the planking had been popped from its fastenings, the fastenings parted, and the seams were standing open. The seams were standing open both on the port and the starboard side, at the turn of the bilge.

Q. And by “the turn of the bilge,” will you indicate, perhaps on this model would be the best, where the turn of the bilge is?

A. Well, it shows the portion of the hull below

(Testimony of Louis Sims.)

the water line, where it turns into and goes into the keel, the surrounding portion of the hull.

The garboard strakes, both the fore and aft ends of both port and the starboard garboard strakes had been strained and were standing out.

Q. And what are the garboard strakes?

A. The garboard strakes is the first strake of planking by the keel, that is, the first hull planking.

The engine, the engine foundations, the engine fastenings that hold it onto the foundation had been pulled, and it was loose. The vessel's entire hull, the planking on the entire hull had been shook up, and with the fastening started and the calking slacked. The main engine was also, as a result of being shook loose from the foundation, was out of alignment. [261]

I believe that this is, briefly, an account of the extent of the damage that we found.

Q. All right. Now, then, will you tell us, Mr. Sims, what was necessary to repair that damage?

A. Well, we removed and renewed an approximate 20-foot section of the starboard bulwarks. We removed and renewed the sheer and 13 strakes hull planking on the starboard side. We——

The Court: 13 strakes?

Mr. Shallenberger: Yes.

The Witness: Yes, sir. We bent and installed 46 bent oak sister frames on the starboard side. We cut out a section of the main clamp, fit a filler block in the section that was removed, and——

(Testimony of Louis Sims.)

Q. (By Mr. Shallenberger): What do you mean by a "filler block," Mr. Sims?

A. Well, it was a block that was fit back in place to replace a section of the clamp we cut out.

In other words, when the clamp was broken, it was impossible to jack the clamp back to the original position. So we had to remove that shattered section and fit in a filler block in the section that we had removed. And then after we had the structure of the vessel jacked back to the original position, we fitted a heavy backing piece over the damaged area and over the filler block that we had fitted, [262] and bolted that through. The backing piece extended over the original, a portion of the original clamp, and was bolted through that.

The hanging knees on both the port and starboard sides of the fish holds, the fastenings were relieved, and there again, after the structure was jacked back, those were refastened.

The main deck beams split on the starboard and were trimmed down, and there were sister frames, side frames, bolted through them. It was too big a job to take out the entire—it wasn't necessary to take out the entire beam. We just simply cut off the damaged area, and fitted the side frames to the beams.

Now, the main guard on the starboard side, we removed the steel facing and renewed an approximate 30-foot section of the main guard, complete from the sheer strake out.

The mast rigging and the chain planks were re-

(Testimony of Louis Sims.)

moved from the bulwark, in the course of repairs, and were reinstalled when the bulwarks were rebuilt.

The ceiling wood on the starboard side of the fish hold was removed and renewed.

Now, on the port side there were seven strakes of hull planking that were removed and renewed on that side. There were 44 stub frames that were cut to template, and installed.

Both the fore and aft ends of the garboard strakes, on [263] both port and starboard, were removed and renewed.

The engine foundations, when we removed the original hold-down bolts, the only thing we could do there was to fit engine stiffeners on the outside of the hull and bolt through them up to the engine, and bolt the engine to them, and secure it in that manner.

The remaining hull planking, the fastenings in the remaining hull planking were also removed and renewed, and it was necessary to recalk the calking and reset, and add additional fastenings on the remaining amount of the hull planking; and after that was effected we recalked the entire bottom.

Our main deck and hatch we removed on the turntable block, the turntable in the aft end of the vessel, we reefed out the aft main deck and provided timbers and jacks, shored it up, and jacked the wracked structure of it back to the starboard, to its original lines, then we refastened our main deck. We resecured the hatch coaming and recalked the deck.

(Testimony of Louis Sims.)

The covering board on the starboard side was the only portion of the main decking that was removed and renewed. That was the covering board that was crushed and broken in the way of the damaged area.

The engine was realigned after we had fitted the stiffeners to provide a sound foundation. [264]

Of course, the vessel was on the dry dock during the course of these repairs from November 30th to January 27, 1949.

Then the hull was painted, the bottom was painted. The engine was realigned after the vessel was afloat, between the date of the refloat on January 27th and the completion of repairs on February 15, at which time the vessel was then redelivered to the owners.

Q. Now, what was done, with regard to repairing the vessel, between the date of January 27th, when she was refloated, and February 15th, when she was turned back to the owners?

A. Well, the repairs that could be made afloat were then being completed.

Q. And what were those repairs, Mr. Sims?

A. Well, the calking of the main deck, and re-alignment of the engine, chiefly, was the final completion of it.

Q. Now, then, Mr. Sims, when was this repair work started?

A. Well, the vessel was hauled there on November 30th, I think, and repairs were started immediately, the next day, probably.

Q. And did those repairs proceed day after day

(Testimony of Louis Sims.)

on all working days until the vessel was turned back to the owners? [265]

A. That is right, with the possible exception of when it rained. I believe I recall that there were some days there that the rain delayed the work; but outside of that, why, it was carried right along in the usual manner.

Q. In other words, on the usual working day, unless there was rain, the vessel was worked on and was not idle?

A. That is correct, yes, sir.

Q. Now, then, Mr. Sims, to your knowledge, was there anything done by Harbor Boat Building Company in repairing this vessel which was not a result of this collision?

A. You mean was there any additional work?

Q. Was there any work done on the vessel which was not occasioned by this collision?

A. Not that I know of.

Q. Well, you were there every day, were you not? A. That is right.

Q. It was your duty to inspect the work being done on this vessel, was it not?

A. That is right.

Q. Now, then, Mr. Sims, do you know how much money was paid to Harbor Boat Building Company for these repairs?

A. Well, the price that we settled on.

Q. All right. What was that price?

A. Well, I think \$17,770.67.

Q. Now, then, Mr. Sims, did you have occasion

(Testimony of Louis Sims.)

to go [266] over the invoices for materials used in this vessel——

A. That is right.

Q. ——in the repair of this vessel?

A. I did.

Q. And did you go over those invoices?

A. I did.

Q. Did you satisfy yourself that the materials were used in the vessel?

A. Yes, sir.

Q. And that it was necessary to use them in the vessel?

A. That is right.

Q. Now, then, did you also check or have occasion to check the time cards of the workmen of Harbor Boat Building Company, for the time spent in labor in the repair of this vessel?

A. That is right.

Q. You did check them?

A. I did.

Q. And did you find them in order?

A. I did.

Q. And, in your opinion, did they represent the proper time, in hours and days and men, which was spent in repairing this vessel in the Harbor Boat yard?

A. That is correct.

Q. Now, then, Mr. Sims, in your opinion, was the [267] figure of \$17,770.—how many cents was it?

A. 67.

The Court: \$17,700?

The Witness: \$17,770.67.

Q. (By Mr. Shallenberger): Now, in your opinion, Mr. Sims, was that figure a reasonable figure for the repair of this vessel as you have stated it was repaired?

A. Yes, sir.

(Testimony of Louis Sims.)

Q. Mr. Sims, do you know Mr. Art Williams?

A. I do.

Q. And he is another surveyor, is he not?

A. Yes, sir.

Q. And was he also employed on this job?

Mr. Callaway: Just a moment——

The Witness: He was in attendance over there.

Mr. Callaway: ——I object to that as calling for a conclusion of the witness.

The Court: Sustained.

Mr. Shallenberger: I will withdraw the question.

Q. (By Mr. Shallenberger): Was he present on this job? A. Yes, sir.

Q. And, Mr. Sims, did Mr. Williams go over the material invoices and the work cards of the laborers with you, on this job?

A. Not with me, but I believe he did go over them. [268]

Q. Was he present at the time the figure of \$17,770.60 was reached with Harbor Boat yard?

A. Yes, sir.

Q. And did he agree that such figure was correct?

Mr. Callaway: Well, I object to that as again calling for the conclusion of the witness. If he had any conversation with him——

Mr. Shallenberger: Probably so.

The Court: Sustained.

Mr. Shallenberger: Of course, any conversation would probably be hearsay, if you object to it.

(Testimony of Louis Sims.)

Mr. Callaway: I will not object to it on that ground, sir.

Mr. Shallenberger: Thank you.

Q. (By Mr. Shallenberger): Was there any conversation between you and Mr. Williams and the Harbor Boat Company, or Mr. Williams and the Harbor Boat Company at which you were present, when this figure was discussed? A. Yes.

Q. All right; will you state what that was?

A. Well, at the completion of the repairs, the repairs had been quite extensive, and it was going to involve a long and detailed invoice. Consequently, Mr. Williams and myself discussed the matter of checking the bills together and agreeing upon the final price. [269]

Q. Well, what did you say, and Mr. Williams, in that respect? In other words, I want you to give the conversation that took place.

A. Well, I can't recall.

Q. I understand. In substance.

A. I just simply asked him if he was in agreement to meeting and discussing, checking the bills, and then agreeing to the figure, the final figure.

Q. What did he say?

A. And he agreed he was.

We got together; I personally checked all the invoices and time cards. We made our appointment, and met at Harbor Boat with Mr. John Rados, Al Rados, and Mr. Williams and myself, and agreed on this figure.

Q. Now, who is Mr. John Rados, and who is Mr. Al Rados?

(Testimony of Louis Sims.)

A. Mr. John Rados is president of Harbor Boat Building Company, I think, and Al Rados is the assistant secretary.

Q. And the Harbor Boat Building Company was the company that performed this repair?

A. Yes.

Q. You say you and Mr. Williams and the Harbor Boat Company agreed to this figure. What did Mr. Williams say?

A. Well, he just agreed that it was a fair and reasonable figure.

Q. Is that what he said, that it was a fair [270] and reasonable figure?

A. Words to that effect.

Mr. Shallenberger: You may cross-examine.

Mr. Roethke: Mr. Callaway, we have a stipulation that this amount was actually paid to Harbor Boat Company, so we won't have to get Mr. Rados up here.

Mr. Callaway: If you tell me it was——

Mr. Shallenberger: I don't believe it was.

Mr. Callaway: If you tell me it was, I will stipulate.

The Court: You don't work for the Harbor Boat Company?

The Witness: No.

The Court: You work for a firm of marine surveyors?

The Witness: Yes.

The Court: What is their name?

(Testimony of Louis Sims.)

The Witness: P. Banning Young.

The Court: They were employed in this case?

The Witness: Yes. In this particular case I was representing the underwriters of the Bear.

Mr. Shallenberger: By the way, may I make this statement, in clarification of what the court asked just before the noon adjournment?

The Court: Yes.

Mr. Shallenberger: The bill on the Bear, I stated, had been paid by the Bear's underwriters. However, nothing had been paid with regard to detention damage or the seamen's loss. [271]

The Court: I understand.

Mr. Shallenberger: I thought probably the court did, but I wanted to make sure.

The Court: I want to ask another question, whether or not these repairs were contracted for by Korgan and Bilas, or contracted for by the underwriters.

The Witness: Korgan and Bilas.

The Court: In other words, Korgan and Bilas came to your company in connection with this repair job?

Mr. Fall: I can give you actual knowledge on that, if the court please. What happened was the owners immediately notified the underwriters they were in a collision, and the underwriters requested the firm of P. Banning Young to survey, on behalf of the underwriters and for the underwriters' account.

(Testimony of Louis Sims.)

The Court: That is what I thought, and I wanted to know if that was the case.

The Witness: That is the case.

Mr. Fall: That is it; and I am sure Mr. Korgan did nothing but notify the underwriters of the collision.

The Court: Of course, my mind is open; I have only heard one side of the case. Like taking a car to a garage for repair, if I have an insurance company and the insurance company undertakes to get it repaired, that is one thing. If [272] I take it in and have a fender fixed up and two or three coats of paint, and the insurance company then comes into the picture, there might be an argument.

Mr. Roethke: No, I think the surveyor is called, and undertakes the survey to see what is necessary for the account of the underwriters, writes up the survey reports and specifications.

Now, if the owners want contemporaneous work done, that is their own account.

The Court: Is the surveyor ordinarily called in by the underwriters?

Mr. Roethke: He is, and paid by the underwriters. In this case, Mr. Young's office rendered a bill and were paid by the underwriters.

Mr. Shallengberger: And I might state this, your Honor, to recall to your Honor the testimony of Mr. Korgan, that he did not order the work done by the Harbor Boat Company, nor did he direct the work to be done. He so testified when he was on the stand.

(Testimony of Louis Sims.)

The Court: Is the underwriters' bill a proper element of damage?

Mr. Roethke: You mean the surveyor's bill?

The Court: Yes.

Mr. Roethke: Yes, it is; and I think Mr. Shallenberger is going to inquire of Mr. Callaway. [273]

Q. (By Mr. Shallenberger): Mr. Sims, did you, on behalf of your employer, P. Banning Young, render a bill for the survey fee, in connection with the survey and repair of the diesel vessel Bear?

A. Yes, sir.

Q. And was that rendered to the underwriters; in care of Mr. Lillick's office?

A. Yes, sir, I believe it was.

Q. And is this amount of \$507.94 correct? Is that the amount that you rendered a bill for?

A. I believe that is the amount.

Q. And has that bill been paid?

A. Yes, sir.

Mr. Shallenberger: You may cross-examine.

Cross-Examination

By Mr. Callaway:

Q. Mr. Sims, how long have you been surveying wooden boats?

A. In my present capacity?

Q. How long have you been a marine surveyor of wooden boats? A. Since July, 1947.

Q. And prior to that time, were you in the patent medicine business of some sort?

A. No, sir. [274]

(Testimony of Louis Sims.)

Q. You never have?

A. Never have what?

Q. Never have been in the patent medicine business?

A. Not that I know of.

Q. Well, now, you knew, did you not, that this boat—oh, I think one of the owners testified—was built in 1917?

A. That is correct.

Q. And you saw her when she was down, when the hull planking was off, and what-not?

A. Yes, sir.

Q. And these photographs are fair representations of her ribs and part of her inside of the hull, are they not?

Mr. Shallenberger: Would you identify them, please, for the record?

Mr. Callaway: Yes. I am showing him Respondents' Exhibits A, B, C and D.

The Witness: Now, what was it again, please?

Q. (By Mr. Callaway): These photographs are fair representations of different sections of her ribs, and part of her hull?

A. That is right.

Q. And these were new ribs that were installed, the ones that appear to be new in the picture, in the boat yard, after the collision, were they not?

A. Yes, sir, that is right. [275]

Q. Now, these old ribs would not even hold fastenings, would they?

A. Certainly.

Mr. Shallenberger: What do you mean, certainly they would or certainly they wouldn't?

The Witness: Certainly they would hold it. The

(Testimony of Louis Sims.)

planking was all there when she came in, except for the section where it was broken loose.

Q. (By Mr. Callaway): Well, did you see any of the nails in that wood that was taken out and thrown aside? A. That is right.

Q. Were they rusted down to the point where they had no holding capacity, any of them?

A. Oh, any time you got a nail you got holding capacity. Any time you have any portion of a nail——

Q. Did you keep any portion of that wood?

A. No.

The Court: What size spikes do they use to put planking on? Do they use spikes to put planking on?

The Witness: Yes.

The Court: What size?

The Witness: It depends on the thickness, and the frames.

The Court: On a board the size of this.

The Witness: They had finish 2-inch planks, and the frames were 2 by 3 built over the original construction. [276]

The Court: And what size spikes were those?

The Witness: About three and one-half inch spikes.

The Court: Three and one-half inches in length?

The Witness: Yes.

The Court: What size in diameter?

The Witness: About $\frac{3}{8}$.

(Testimony of Louis Sims.)

The Court: And was that the size that was used?

The Witness: I believe that was pretty close to it, yes, sir.

Q. (By Mr. Callaway : Well, did you furnish Mr. Williams a copy of this survey you made in this case?

A. Did I furnish Mr. Williams?

Q. Yes. A. No.

Q. Isn't that customary?

A. No, it is not. My survey was made for the benefit of the underwriters of the Bear.

Q. Now, from your observation of this boat, would you say that this planking that you see missing in Respondents' Exhibit A was in good condition, or rotten? A. Well——

The Court: That is, interior planking in Respondents' Exhibit A?

Mr. Callaway: Yes, that is missing.

The Witness: It was ceiling wood on the inside of the [277] fish hold, and that is nailed to the inner side of the frames.

The Court: Is that 1-inch?

The Witness: That is just a little over, I think, an inch and a half in thickness.

Mr. Shallenberger: Keep your voice up, Mr. Sims.

The Witness: All right. So far as the planking is concerned, and so far as the rotted condition is concerned, the planks there, that is like saying that a table that may have rot in it, that is saying your table is rotted.

(Testimony of Louis Sims.)

Q. (By Mr. Callaway): I didn't ask you that. I asked you a simple question: Was that rotten, or was it in good condition?

A. That is my answer. Sure there is a certain amount of deterioration there, but if you say a plank is rotten, to what extent?

Q. Well, these ribs here that you see in Respondents' Exhibit B, were they rotten or were they in good condition?

A. Well, they are broken.

Mr. Callaway: I didn't ask you that.

Mr. Shallenberger: You asked the condition.

Mr. Callaway: I asked him if they were rotten or in good condition, irrespective of whether they are broken or not.

The Witness: I don't know whether they were rotten or not. [278]

Q. (By Mr. Callaway): Didn't you see them?

A. Sure, I saw them. I didn't take these pictures.

Q. That doesn't answer——

A. Some of them were partially affected by a certain amount of rot, and some of them weren't.

Q. Now, they were all replaced, though, were they not?

A. No, they weren't replaced. There were sister frames added. There were sister frames added to the starboard side and stub frames added to the port side.

Q. And instead of taking the frames out, you added the frames in, as you see in this picture?

A. Yes.

(Testimony of Louis Sims.)

The Court: It would cost more money to take them out?

The Witness: Yes.

The Court: You would have to take it clear to the bottom of the keel, and to the top?

The Witness: That is correct.

The Court: And by putting sister frames in, you could leave the undamaged portion there?

The Witness: The hull planking not affected by the damage. In other words, what we did, we removed the planking that was affected by the damage, then the frames, of course, were longer than the area of planking removed, and we shoved them down, and back up, and refastened through them.

Q. (By Mr. Callaway): Now, when did you first have a [279] copy of this so-called itemized bill from the Harbor Boat Building?

A. That copy you have there?

Q. Or any copy of it.

A. Well, this first copy here was——

Q. No, no.

A. ——rendered on completion of the repairs.

Q. I am not asking——

A. This copy here I obtained last week, or just recently.

Q. Was it made up at that time?

A. Was what made up?

Q. This copy last week.

A. I don't know whether it was made up at

(Testimony of Louis Sims.)

that time or not. I went and asked them for it, and they got it for me.

The Court: What do you mean by "that time"?

The Witness: Pardon?

The Court: What do you mean by "that time"?

Mr. Callaway: I mean February 16, 1949.

Q. (By Mr. Callaway): You never furnished a bill such as that to Mr. Williams?

A. As to that, I don't know. I know that I received five or six copies of it.

Q. You know whether or not you sent Mr. Williams a [280] copy of this after you——

A. I didn't send it to him.

Q. Well, did you send him a copy of your original bill you had in your possession?

A. I did not.

Q. You did not?

A. I never sent him any. Harbor Boat may have sent it to him, I don't know.

Q. Now, so on all the work you did on the Bear, you didn't find any of this replacement of damaged or deteriorated parts, according to your survey, attributable to deterioration and wear and tear; is that right?

The Court: What is that question? Read it.

(The question was read by the reporter.)

Mr. Callaway: I will reframe it, if you don't understand it. In other words——

The Court: I know what you are getting at.

(Testimony of Louis Sims.)

Mr. Callaway: I probably haven't framed it very well. I will try it over again.

Q. (By Mr. Callaway): You didn't attribute any of this damage, so-called, to the owner's account, on account of deterioration, ordinary wear and tear?

Mr. Shallenberger: Just a minute. I will object to that as ambiguous and uncertain. I certainly don't know what that means. [281]

The Court: Well, I will overrule your objection. He may answer.

The Witness: So far as the repairs to this vessel are concerned, they were all the direct result of the collision and the damage.

The Court: What condition were the two main deck beams in, that you mentioned?

The Witness: The main deck beams——

The Court: You said the ends were split.

The Witness: The ends were crushed; they were shattered.

The Court: What condition were those two beams in?

The Witness: You mean the soundness of the timber?

The Court: Yes.

The Witness: Yes, they were sound.

The Court: As I visualize this from your testimony, they would run crossways?

The Witness: Yes.

The Court: And the ends of them came out some-

(Testimony of Louis Sims.)

where near the point where the point of impact occurred?

The Witness: That is correct.

The Court: Do they come somewhere near the guard rail?

The Witness: Yes, sir.

The Court: Just below the deck, are they?

The Witness: Yes.

The Court: And the guard rail—— [282]

The Witness: Is on a line with the deck.

The Court: These two beams, then, caught a certain amount of the force of the collision?

The Witness: That is correct. And it was by being struck this terrific force on the end of them, when it was struck, and it pushed the entire after deck to port.

The Court: What do those beams lay against on the other end?

The Witness: The other side of the vessel, and bolted into the clamp.

The Court: Do they snug up against the clamp in this manner (indicating)?

The Witness: No, rest on top of it.

The Court: Bolted down?

The Witness: Bolted through.

The Court: And do the ends—what do the ends rest on?

The Witness: They rest against—well, they are alongside of the frames.

The Court: Are they bolted to the frames?

(Testimony of Louis Sims.)

The Witness: Yes, sir. The clamp is bolted to the frame, also.

The Court: The planking is nailed to the main deck beam?

The Witness: Yes.

The Court: And the knees are fastened to the deck beam? [283]

The Witness: Yes, sir. That is bolted to the deck beam, and also to the ceiling wood.

The Court: Is the knee also fastened down to the main clamp?

The Witness: It is notched so it fits up over the clamp.

The Court: It is not bolted to it?

The Witness: Not bolted to it, no, sir. And on this area in the starboard side that was crushed, you have a total thickness of the main guard, of 6 inches, 2 inches of the sheer strake, and 4½ inches of the main clamp, making a total of 12½ inches of timber that was completely broken; and also the end grain of the two deck beams was crushed and shattered.

The Court: Counsel, you can object to my questions, if you want to. You can object at any time.

Mr. Callaway: No, I understand.

The Court: Let me ask you this: Supposing those two main deck beams that ran crossways across that ship had been, we will say, very badly worn and, we will say, rotten?

The Witness: Yes.

The Court: So that they would have collapsed

(Testimony of Louis Sims.)

from the force of a blow on the ends of them; would there have been less of a shock against the port side of the boat, or is that a possibility? They would have to be pretty rotten, wouldn't they?

The Witness: Well, of course, the thing that probably would have happened there,—in other words, suppose there had been no deck beams there, the bow of the other vessel would probably have knocked into the side of the deck planking, and that, laying across the deck, probably still would have carried the shock of it to the port side.

The Court: All right.

Q. (By Mr. Callaway): Now, the deck planking runs in what direction?

A. Fore and aft.

Q. Back and forward. Now, is this a reasonable representation of a view of the deck, I suppose looking toward the fish hold?

The Court: Exhibit what?

Mr. Callaway: It is not in evidence yet, your Honor.

The Court: Not marked.

The Witness: I don't even know if this is the same one or not.

Mr. Callaway: If you don't know, that is all right. I will mark it for identification.

The Clerk: Respondents' Exhibit K, for identification.

(The photograph referred to was marked Respondents' Exhibit K, for identification.)

(Testimony of Louis Sims.)

Q. (By Mr. Callaway): Whether or not this is a photograph of the deck, what was done at or about that part of the [285] Bear with respect to repairs?

A. Well, the calking in the main deck was reefed out. The calking was reefed out, and shoring was provided in the interior of the fish hold, together with jacks, so we could jack it back, jack the wracked structure to the original lines, then the fastenings were reset in the deck and the deck was recalced.

The Court: What kind of fastenings?

The Witness: Nails, short spikes.

Q. (By Mr. Callaway): Anything else?

A. Anything else what?

Q. Done, as far as that particular part of the boat is concerned?

A. Well, what do you mean "done"?

Q. Have you told us everything that was performed in the way of repairs or restoration in that part of the boat?

Mr. Shallenberger: Do you mean the deck, or that portion of the boat?

Mr. Callaway: That portion of the boat that this picture shows.

The Witness: Well, as I remember, that is it, yes.

Q. (By Mr. Callaway): Now, is it your testimony, Mr. Sims, that in so far as you know, this work was completed as expeditiously as it could

(Testimony of Louis Sims.)

have been, that is, without working Sundays or nights or days when weather didn't permit? [286]

A. That is right.

Q. In other words, every time you were there on a day that was a work day and that the weather wasn't inclement, somebody was working on the building?

A. That is right.

Mr. Callaway: I have no further cross-examination.

The Court: Just one question or two here that I want to ask you about.

You say on the port side that seven strakes of hull planking were removed?

The Witness: I believe that is what I said. I can check here a minute.

The Court: What was wrong with the strakes on the port side?

The Witness: The strakes on the port side had been—yes, seven strakes. They had been kicked out at the bottom end of the knees, and the entire side of the vessel had been kicked out when it it it.

The Court: The strakes are just the planks on the outside?

The Witness: Yes.

The Court: And by "kicked out," you mean the fastenings had come loose and they were loose?

The Witness: Yes. The foot heel frame or knee had broken the frames. [287]

The Court: Inside?

The Witness: Yes, sir.

The Court: Why was it necessary to remove

(Testimony of Louis Sims.)

these seven strakes? Was any planking put in?

The Witness: Yes, there was. The planks were removed so we could install the stub frames alongside of the original frames, to repair the broken frames.

The Court: What was wrong with the planking that it couldn't be put back?

The Witness: Well, when you tear it off you don't use much—I mean it is usually quicker and cheaper and a better job to go ahead and pull it off, and you save time, rather than try and salvage it.

The Court: In other words, when taking it off, it is sometimes just pulled out?

The Witness: Yes.

The Court: And it is cheaper to put new planking on than to carefully take off the plank that is there?

The Witness: Yes; because the labor involved is greater cost than the lumber.

The Court: Thank you.

Mr. Shallenberger: Do you have any more questions, your Honor?

The Court: No. [288]

Redirect Examination

By Mr. Shallenberger:

Q. Mr. Sims, calling your attention to the Respondents' Exhibit B, which Mr. Callaway showed you a while ago, and calling your attention to these sister frames, why was it necessary to put those sister frames in, Mr. Sims?

(Testimony of Louis Sims.)

A. Well, because of the broken and split condition of the original frames.

Q. And by "broken and split condition," what do you mean?

A. Well, they were broken, they were split out here, split and broken there (indicating).

Q. Now, did you form any opinion as to what broke them or split them?

A. Well, that is right on the line with the lower end of the knees, where the knees fit on the inside of the fish hold, and that also was on the line of the turn of the bilge; and when the knees were kicked out, evidently that is what broke them.

Q. In other words, it is your opinion that these were broken at the time of the collision, is that correct?

A. That is correct.

Q. Now, then, Mr. Sims, do the ribs or the frames—those are the same things, aren't they?

A. Yes, that is right. [289]

Q. Do the ribs or the frames constitute the strength member of the vessel?

A. Well, not in the true sense of the word, no. It is not one of the main strength members of the vessel.

Q. What is the purpose of ribs or frames?

A. The ribs or frames is what forms in the line of your hull, and it is to them that the hull planking and skin of the vessel is fastened.

Q. And is their main purpose to hold the hull planking?

A. Yes, a means to install your hull planking.

(Testimony of Louis Sims.)

Q. I notice in this Exhibit B of respondents—I don't know if there was any testimony directed to this particular matter or not—I notice some timbers extending a portion of the way down in the three places there alongside of the planks.

Would you tell me what those are?

A. Those are the lower ends of the bulwark stanchions.

Q. And those are not frames? A. No, sir.

Q. And did they ever extend below——

A. No.

Q. ——the area shown? A. Never.

Q. In other words, they are as they were when they [290] were installed? A. That is right.

Mr. Shallenberger: No further questions at this time.

Mr. Callaway: Excuse me.

Recross-Examination

By Mr. Callaway:

Q. The truth of the matter is these frames here, whether they were broken or not, wouldn't hold a spike, would they?

A. They wouldn't hold a spike?

Q. Yes. A. Not in their present condition.

Q. Now, you replaced 40 frames, didn't you, in all? A. Something like that.

Mr. Shallenberger: I think it was 46.

Q. (By Mr. Callaway): Well, it is your contention that all of those were broken as a result of force? A. It is my contention what?

(Testimony of Louis Sims.)

Q. It is your statement in the testimony that they were all broken as a result of force?

A. They were all broken as what?

Q. As a result of force or collision.

A. No, I didn't say that.

Q. Well, I misunderstood you.

A. I said all of the repairs that were effected were [291] effected as a result of the collision.

Mr. Callaway: All right, that is all.

The Court: That is all. You may step down.

(Witness excused.)

Mr. Shallenberger: If the court please, that, I believe, is the libelants' and the interveners' case, with one exception, that exception being the further testimony as to detention damage and as to the loss of earnings of the fishermen.

Mr. Callaway and I have met once or twice during the course of the trial, and some figures have been exchanged with regard to determining that. I believe that probably we can determine that without the necessity of taking further evidence on it. However, the question does not affect the question of liability, and if it is necessary to take further evidence, I believe Mr. Callaway is willing that it may be taken before the Commissioner; is that correct?

Mr. Callaway: Yes.

The Court: In other words, if there is a finding in favor of libelants, and if you don't get together on what you think the detention damage and loss of the fishing venture was, then it would be referred to Commissioner Calverley?

Mr. Shallenberger: Yes.

The Court: Before you close your case, there has been some reference to Peter Svorinich. Is it stipulated he was a member of the crew? [292]

Mr. Shallenberger: He was on the stand.

Mr. Roethke: I think the one you are referring to, your Honor, is Zukowski.

The Court: Zukowski is the one I was referring to.

Mr. Fall: It was testified by one of them that he was a member.

Mr. Shallenberger: I am glad your Honor brought that up. May I call Mr. Korgan for a minute on redirect examination?

The Court: Mr. Bilas was not called as a witness?

Mr. Fall: No.

The Court: It is stipulated he was a member of the crew?

Mr. Fall: Yes.

The Court: There may have been some testimony, but my notes don't so show.

Mr. Callaway: If they say so.

Mr. Shallenberger: That is Mr. Bilas? I will have Mr. Korgan testify with regard to Mr. Bilas.

GEORGE KORGAN

one of the intervening libelants herein, recalled as a witness by intervening libelants, having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Shallenberger:

Q. Mr. Korgan, you are a partner of Sam Bilas, and he [293] was also fishing on the boat Bear during the October to February, 1948-1949 sardine season? A. No.

Q. He was not?

A. He was fishing in the beginning three days, then he gets sick, then he went to hospital.

Q. Was it contemplated he was going to fish the rest of the season, or not?

A. I don't think so, because he is sick yet.

Mr. Shallenberger: I am sorry, your Honor. I didn't understand. You may be excused.

(Witness excused.)

Mr. Shallenberger: In that case, we will ask——

The Court: Does the record show the share, the boat's share was 32 per cent, as I recall?

Mr. Shallenberger: Yes.

The Court: And the crew's share was 68 per cent?

Mr. Shallenberger: Split among them equally; and that Mr. Korgan received an equal share along with the rest of them.

Mr. Callaway: If these gentlemen will sign the stipulation I prepared, that is included in it.

The Court: I haven't seen it.

Mr. Callaway: It hasn't been signed.

Mr. Shallenberger: I signed it at 9:30 this morning. [294]

Mr. Roethke: I haven't signed it. I don't know what Mr. Callaway means by paragraph 3. I will ask him to explain it. If he can——

Mr. Callaway: I will show it to you.

(Handing document to the court.)

The Court: I thought that Mr. Roethke asked for a stipulation early in this proceeding with reference to the necessity of impleading certain people; or was it Mr. Callaway?

Mr. Callaway: I was the one that asked it. Of course, it is a matter that concerns only Mr. Shallenberger and Mr. Fall; it doesn't concern Mr. Roethke at all.

I stated my position at the pretrial hearing.

Mr. Roethke: Now we have a reporter present, if you will, restate it.

Mr. Callaway: There is some indication in the cases, your Honor, where you have to implead any party that might be responsible for any portion of the damage. I don't want it to be said at the conclusion of this case—in other words, a libelant, as I understand it, like a plaintiff, can pick out the party that they want to sue, and even though others are liable, simply because they don't sue them doesn't change their position, except in a case of this kind where, assuming that the court made a finding of mutual fault, then I don't want it to be said, "That

doesn't make any difference; they are not before the court in the intervening libel of the [295] fisherman case, so to speak, so you would be liable for the whole amount anyway."

It is just a remote possibility. I don't want to file another pleading, but if counsel won't have it another way I will do it.

Mr. Roethke: I still don't understand what you are driving at.

The Court: As I understand, except for the limitation—if you said it is not necessary that the respondent implead the owners of the Bear, period, that makes sense. Then if you add on to it——

Mr. Callaway: I am willing to strike that last out.

The Court: Does that solve your problem?

Mr. Shallenberger: It makes his problem worse.

Mr. Roethke: I don't know what he is driving at. Mr. Callaway says he wants to get out of filing a cross-libel, I don't understand his position.

Mr. Callaway: It isn't sinister.

The Court: As I understand Mr. Callaway's position, there are cases where, when it appears there might be mutual fault, there is some problem unless all the parties are impleaded; is that it?

Mr. Callaway: Yes.

The Court: So he wants the stipulation so he can argue there was mutual fault as far as both vessels are concerned, [296] and argue that in the claims for the fishermen; and except for the limitation, can argue it as far as the claims of the vessel.

Mr. Roethke: Your Honor, I think he can argue it as it is.

Mr. Callaway: Then what harm to have a stipulation?

Mr. Roethke: Then it is mere surplusage. You want something you already have. I still don't know what this means, and I don't want to have it thrown in my face later, as I have in the past, that this means something other than what it says. I don't know what it means.

Mr. Fall: Isn't it a fact, on this claim of mutual fault, in the event the court would find there is mutual fault, then you wish to proceed against the owners of the Bear with reference to your recovery of one-half of the amount you may be found liable for by reason of the obligation at sea and the loss of that catch?

Mr. Callaway: That is the size of it. In other words, I don't want you—Roethke isn't in this case—I don't want you and Shallenberger to argue that can't be done. If you tell me you won't, we can strike out the whole of paragraph 3 that says by the fact we have not impleaded the Bear we would be foreclosed from contending for any reduction in damage we would be entitled to even in the event of mutual fault. [297]

Mr. Fall: I don't think that is an issue here. In other words, if he is seeking to recover from them, it is not necessary to be a party to this particular action.

The Court: I know, but he wants it settled in this action. Can't we settle it now? Leave Mr.

Roethke out—Strike paragraph 3 from the stipulation, and Mr. Roethke won't be interested—and have the stipulation that in the event the court finds there is mutual fault between the vessels, and in the further event the court finds that the fishermen are entitled to some recovery, that Mr. Callaway will have whatever right he has against the owners of the Bear, in the same manner as though he had impleaded them?

Mr. Callaway: That is all I want.

The Court: Is that satisfactory?

Mr. Fall: I have no objection.

Mr. Shallenberger: I never had any objection.

Mr. Roethke: Now he is getting me into it. I am representing the owners of the Bear, as far as the legal rights are concerned.

Mr. Callaway: You don't have to enter into that.

The Court: I don't think that affects the case. Read the statement I made.

Mr. Roethke: It affects the recovery against my people. If he wants any recovery here, we are 13 months after the collision, and Mr. Callaway is trying to file a cross-libel [298] against me without filing a pleading.

The Court: Read my statement.

(The record was read by the reporter.)

The Court: I meant for that apportioned for the fishermen's recovery. That is what I meant, the fishermen's recovery only.

Mr. Callaway: I still am agreeable to that.

Mr. Fall: I do not stipulate that my clients would not be entitled to a judgment——

The Court: Well——

Mr. Fall: Let me explain it. ——against one party for the whole or against the other party for the whole. As far as impleading, I don't care.

The Court: You gentlemen talk about it in the recess, and let's go ahead with the case. If you can't get together with them, you have a right, I take it, to file an intervening libel.

Mr. Callaway: Yes, I do.

The Court: See if you can't get together.

Mr. Roethke: I only want it pinned down. I don't want to stipulate to something I don't know.

Mr. Shallenberger: If the court please, in order that the record may be straight in regard to the intervening libelant, Sam Bilas, I hereby move to dismiss the third cause of action so far as the intervening libel of Korgan and [299] Bilas, in so far as Sam Bilas is concerned.

Mr. Callaway: No objection.

The Court: Motion granted. That was the portion involving the fishermen's share?

Mr. Shallenberger: That is correct. In other words, I would rather have it that way than to have a finding against him.

The Court: In other words, that means there are only nine shares instead of ten?

Mr. Shallenberger: No, there are still ten shares. In other words, Bilas was not aboard the vessel when this accident occurred, and they had another man take his place, and apparently, from Mr. Kor-

gan's testimony today—which I hadn't heard before—he undoubtedly would have finished out the season.

Mr. Callaway: Is he before the court?

Mr. Shallenberger: Yes.

Mr. Fall: Ancich, Kaiza, Bogdanovich, Svorinich, Miskulin, Zukowski, Decker, Hoopes, Korgan and Milosevich. That makes ten.

The Court: That is right; Bilas would have made eleven.

Mr. Roethke: Bilas, of course, if the court please, is before the court as far as——

The Court: I understand. You rest, then? [300]

Mr. Shallenberger: Yes, with the understanding I mentioned.

Mr. Roethke: With the exception of the point on the libel.

The Court: You may proceed.

Mr. Callaway: Do you want to take a recess at this time?

The Court: All right.

Mr. Callaway: I want to ask you, what time do you plan to finish? I am running a little fever.

The Court: I was planning to work you fellows a little late, because I have another case set for tomorrow; but I have made an appointment with some fellows on a record to settle, who are supposed to be here at 4:00 o'clock. If they come into the court room, I will adjourn. Is that all right with you?

Mr. Callaway: Yes. I will finish the evidence tomorrow.

The Court: You will take all day, you mean?

Mr. Callaway: No, I will finish by the middle of the afternoon.

The Court: How many witnesses do you have?

Mr. Callaway: Well, I have got about ten. We may get down to the place where I will ask for a stipulation that if the others were called they would testify substantially so-and-so, because when you get down to the witnesses who [301] didn't actually see the two boats, I think we can stipulate.

Mr. Shallenberger: I think we can shorten it considerably, your Honor.

The Court: All right, we will take a short recess.

(A short recess was taken.)

The Court: One thing more. Mr. Callaway made an objection, before the first witness was called, to the introduction of any evidence, and I take it for the purpose of the record his objection has gone to the testimony of any witness concerning the rights of the fishermen?

Mr. Shallenberger: Yes.

The Court: We might as well keep the record straight. I think that is the intention of all of us.

Mr. Callaway: Yes, sir.

The Court: The record will so show.

Mr. Callaway: I call Vincent Tudor.

VINCENT TUDOR

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

(Testimony of Vincent Tudor.)

The Clerk: Your name is Vincent Tudor?

The Witness: Yes.

The Clerk: Take the stand.

The Court: What is this witness' name?

The Witness: Tudor; Vincent Tudor. [302]

Mr. Shallenberger: We can't hear the witness.

The Witness: Vincent Tudor.

The Court: What is his capacity?

Mr. Callaway: He was in the pilothouse with the skipper, and he is working, and we are anxious to get rid of him today.

The Court: Here is what I have in mind: I take it this is Mr. Borcich (indicating)?

Mr. Callaway: Yes.

The Court: Has this gentleman been in court at all?

Mr. Callaway: No. He has been here two days.

The Court: Have you any objection to Milosevich being permitted to be in here during his testimony now?

Mr. Callaway: No.

The Court: The bailiff can call him in and let him remain in here. He is probably out in the corridor.

Go ahead.

Direct Examination

By Mr. Callaway:

Q. Where do you reside, Mr. Tudor?

A. San Pedro.

Q. Will you keep your voice up, please?

(Testimony of Vincent Tudor.)

A. San Pedro.

Q. By whom are you employed at the present time? A. Andrew Vilicich.

Q. In what capacity? [303]

A. Fisherman.

Q. What boat? A. Gallant.

Q. On November 30, 1948, what were you doing?

A. I was employed on the Marsha Ann.

Q. As a fisherman? A. As a fisherman.

Q. Do you recall a collision that happened about 11:30 a.m. of that day? A. Yes, sir.

Q. And where were you before the collision occurred?

A. I was—as soon as we left the harbor, it got foggy, and I went up on the bridge.

The Court: Who else was on the bridge?

The Witness: The skipper.

Q. (By Mr. Callaway): Who was that?

A. Jack Borcich and Martin Zitko. Us three were on the bridge.

Q. Will you state, Mr. Tudor, when it was that you first saw the Bear?

A. Oh, I don't know; it was, I would say, close to us—the fog was thick—I would say 15 or 20 feet.

Q. And where was she at that time?

A. She was coming in towards the lighthouse.

Q. And how far were you outside the break-water at that [304] time?

A. Oh, I would say approximately half a mile or so.

(Testimony of Vincent Tudor.)

Q. And where was she, off your port or starboard?

A. Oh, she was off of our port bow.

Q. And was the Marsha Ann moving or standing still?

A. No, our engine was disengaged at the time.

Q. Was she moving in the water, or standing still?

A. Well, it could have been coasting, I wouldn't say it couldn't have been; but the engineer hollered—he was looking on the radar, and he hollers out that he sees a couple of boats on the screenhead there, then we disengaged the engine.

Q. How long had it been disengaged?

A. I would say—I don't know exactly, maybe five minutes or so.

Q. By the way, was the Bear moving or standing still? A. She was moving.

Q. And describe the movement, as far as you can, in your own words. Was she crossing your bow or headed into you, or what?

A. Well, she was coming toward—she came toward our port and crossing our bow.

Q. By the way, had you heard any whistle signal from the direction from which the Bear came?

A. Well, there was two or three boats at our bow, and [305] there was signals all over.

Q. Was your boat making any whistle signals?

A. Yes, we were giving about a signal every minute or so, approximately. When inside the breakwater, we gave one signal about every minute.

Q. I am not talking about what the condition of

(Testimony of Vincent Tudor.)

the inside of the breakwater was. I am talking about this five-minute interval when your engine had been disengaged.

A. Well, the skipper there was blowing on the whistle steady there, probably two whistles there at very short intervals when we got outside there.

Q. Tell us what happened.

A. Well, it happened so fast. We heard an engine; we didn't see no boat, we just heard an engine, and before we know it he was on us there, and the skipper hollered to him, "What the hell is the matter with you, are you crazy?" He hollered to the skipper of their boat; he was on the bridge.

And he swung hard to port, and the way he swung into port there, in addition, he just swung into our bow the way he swung to port.

Q. Then what happened?

A. The boat come alongside, and we grabbed lines right away. She was filling up with water, I guess, pretty fast. The fellows got excited over there, throwing clothes [306] on our boat.

We got some heavy lines and throwed them on and secured them on. I guess if we didn't do that she would have sank.

Q. Was there anybody stationed in the bow of the Marsha Ann at this time?

A. Yes, there was.

Q. Who was it? A. Steve Kuljis.

Q. How do you spell it, do you know?

A. I think it is K-u-g-l-i-s.

(Testimony of Vincent Tudor.)

Q. How much *disability* would you say that you had at that time?

A. Well, like I said, we couldn't see them until he was just about on us. The fog was that thick.

Mr. Shallenberger: I move to strike that answer as not responsive.

The Court: Objection overruled. That is about the only way he could describe the light, I guess. That is one way to describe it anyhow.

Q. (By Mr. Callaway): Were the running lights of the Marsha Ann on or off? A. On.

Q. Was there any forward motion to the Marsha Ann that you were aware of at all?

A. Well, like I said, it is pretty hard to [307] tell, a heavy boat like that, and in five minutes—I don't know, we might have been coasting or standing still, but the engines were disengaged. We disengaged them probably five minutes before that.

Q. What was the first thing that you knew of that apprised you of an approaching boat, when you saw it or anything else?

A. Well, we heard the engines at first.

Q. Well, when she hove into sight, was there any whistle signal given by the skipper of the Marsha Ann?

A. Pardon? I didn't get that.

Q. When she hove into sight, when you could see her—— A. Yes.

Q. ——was any whistle signal given by the Marsha Ann at that time, or do you remember?

A. I don't remember. When he hove into sight

(Testimony of Vincent Tudor.)

there everybody got excited, and you don't know what happens.

Q. Now, you say that just at the time of the accident, just before, you made a hard turn to the left or to the port?

A. No, I guess he must have seen the boat, or something, and come right onto it, and he turned hard over to the left, to the port there, and the way he turned to the port it just dug into our bow. Swung the boat a little, and he come alongside, like at our port side. [308]

Q. At any time did your boat push his boat hold in the water? A. I don't think so.

Mr. Callaway: You may cross-examine.

Cross-Examination

By Mr. Shallenberger:

Q. Mr. Tudor, about what time was it when you got into this dense fog?

A. Oh, I don't know. It was—we don't look very much at the clock there.

Q. Well, about how long was it before the collision that you got into this dense fog?

A. I really don't know.

Q. Well, was it a minute, or a half hour, or what?

A. Oh, I would say it must have been a half hour or better. I am not sure, though, I don't know.

Q. Was it an hour?

A. Well, when we left the harbor—as soon as we left the harbor, she wasn't too bad. When we

(Testimony of Vincent Tudor.)

got outside the fish harbor, well, she started to get foggy, started getting pretty thick.

Q. Started to get foggy as soon as you got out of the fish harbor?

A. Well, when we passed the fish harbor by the prison they used to have there—— [309]

Q. Yes.

A. ——Dead man's Island, or something.

Q. Yes? A. Yes.

Q. It started to get foggy then? A. Yes.

Q. And that was before you passed the light?

A. Oh, yes.

Q. Where is the radar located on the ship?

A. That is above the pilothouse.

Q. Well, where is the radar screen located?

A. In the pilothouse.

Q. And were you watching the radar screen yourself?

A. No. The engineer was watching it.

Q. And do you keep any log of what you see on the radar screen?

A. I think—I am not sure whether the chief kept a log or not. He usually looked at the screen there.

Q. What were you doing on the pilothouse, Mr. Tudor?

A. Well, I have been shipwrecked a couple of times and I am kind of leery when it gets foggy, and I go up there; and the chief is inside, and he hollers out to us whether there is any boats on the

(Testimony of Vincent Tudor.)

bow or on the left, and we usually relay over to Jack.

Q. Were you in the pilothouse or were you out on the [310] bridge?

A. No, I was right out on the bridge there.

Q. Will you indicate on this model, to me, where you were on the bridge, Mr. Tudor?

A. I was right here (indicating), and we usually leave this window open here, so when Bert, the chief, hollers out, we can hear, because the door is over here (indicating).

Q. Yes?

A. We usually leave this window open so we can relay to Jack on the wheel.

Q. So you were on the port side, pretty well forward on the flying bridge?

A. Yes, right here (indicating). Here is the window, too, pretty close. I leaned against the window there.

Q. Now, did you hear the chief holler out about the two boats on the radar screen?

A. Yes. The chief is always——

Q. What did he say?

A. He says, I think, there was two or three boat we picked upon the screen.

Q. Well, what else did he say, if anything?

A. Well, he tells us about how far off they are, or a quarter off the bow, or usually tells us how far away they are.

Q. What did he say about them in this [311] case?

(Testimony of Vincent Tudor.)

A. I think he told us there was supposed to have been two boats on our port and one on our starboard; and as soon as he told us that, Jack disengaged the engines.

Q. Did he give you any bearing, where these boats were?

A. Yes, he usually tells us how far off they are, so many degrees off the bow.

Q. Do you recall what he said in this case?

A. No.

Q. You don't recall what he said?

A. I don't recall how many degrees off the port side he said.

Q. Do you recall whether he gave any estimate of the distance?

A. Yes. I think he said they were three or four hundred yards off, or five hundred yards off of bow, our port side. I think one boat was off our starboard bow.

The Court: Who do you mean by the chief, Jack Borcich?

The Witness: No, Bert Zankich.

The Court: The chief what?

Mr. Callaway: Chief engineer.

The Witness: Chief engineer.

Q. (By Mr. Shallenberger): Now, then, did you have any more reports from the chief before this collision occurred?

A. Well, as soon as we got outside the breakwater, he [312] picked her up on the radar and said

(Testimony of Vincent Tudor.)

we were so far off of it. We were going to take a course to head down east, southeast.

Q. Well, did he pick up these vessels on the starboard bow and port bow before you got out of the breakwater?

A. Oh, I would say they were probably—we were abreast of the breakwater, probably, the light-house, when we picked them up.

Q. I see. Then did he say anything between that time, give any reports between that time and the time of the collision?

A. No. Just when he said there was—I think there was two or three boats off our bow, I think one off on the starboard; and two on the port, and then he said something—he told Jack, and then Jack disengaged the engine.

Q. And you didn't hear any more reports from the chief from that time on?

A. Well, as a boat gets in so——

Q. Just answer. Were there or weren't there?

A. Well, I don't think so, after they were inside——

Mr. Shallenberger: That is all.

Mr. Callaway: Let him finish. Don't stop him. State what you were going to say.

Mr. Shallenberger: That answers the question.

The Witness: I was going to say, you can pick them up [313] on the screen, and when they get so close you can't pick them up any more.

Q. (By Mr. Shallenberger): Now, then, at the time you came out past the light and the break-

(Testimony of Vincent Tudor.)

water, were you in the position that you have indicated on the flying bridge?

A. I was about the same spot.

Q. Did you remain in that spot until the time of the collision? A. Yes.

Q. When you first saw the Bear, what did you do, you personally?

A. We started hollering, and I hung on. It appeared it was so close that it didn't look like you could get away from being a collision, and I just hung on, just braced myself.

Q. You started hollering, you say?

A. Yes, we started hollering.

Q. What did you holler?

A. Oh, I don't know. We got all excited there. "What the hell is the matter with you guys?" or something, I don't know.

The Court: Did you say that?

The Witness: I am not sure. We got so excited there we were hollering, "You crazy guys," or something, I don't know.

The Court: Did you say that? [314]

The Witness: I am not sure. See, we got so excited, we were hollering, and the skipper had told the other skipper—I personally heard him say, "What the hell is the matter with you? Are you crazy, you damned fool." Just like that he told him.

Q. (By Mr. Shallenberger): Where were you headed for, Mr. Tudor?

A. Well, we were going to head, I believe, down Oceanside.

(Testimony of Vincent Tudor.)

Q. Do you know whether there were any weather reports as to the condition of the weather in the direction of Oceanside?

A. No, I don't.

Q. You had a sending and receiving set, of course, on the Marsha Ann, did you not?

A. Yes.

Q. A ship-to-shore phone?

Mr. Callaway: Answer out loud.

The Witness: Yes, sir.

Q. (By Mr. Shallenberger): Now, then, Mr. Tudor, will you state to me, if you can, how fast the Bear appeared to be going when you first saw it?

A. Well, that is pretty hard to say. I would say he was going maybe four or five knots. It is pretty hard to tell exactly.

Q. How far did he continue at that speed? [315]

A. Well, when he hit us he didn't continue any more. The way he swung hard over on the left there and just ran into us——

Q. In other words——

A. ——it happened so fast.

Q. ——he kept going at the same speed?

A. He was going, I would say, four to five knots when he hit us.

Q. And did he maintain the same course until the time he hit you?

A. No, he swung hard over to the left.

Q. And how close was he to you when he swung hard over to the left?

(Testimony of Vincent Tudor.)

A. He was right next to us.

Q. Well, how close was that?

A. That is hard to say.

Q. One foot?

A. Oh, it was more than that. I would say——

Q. 40 feet?

A. I would say maybe right on us, just about. Say 10 feet, or something, we started hollering; 15 feet or so. It takes a little time to swing a boat over. You can't turn a boat right around on——

Q. Did you see anybody on the pilothouse of the Bear? [316]

A. The only fellow I seen up there was the skipper.

Q. Who was that? A. Milosevich.

Q. Did you see anybody else there?

A. No, I didn't see nobody else.

Q. Did you know it was Milosevich at the time, or did you later find out it was?

A. No, I knew it was him. I had seen him before.

Q. You recognized him? A. Yes.

Q. Now, did you see Milosevich do anything?

A. Well, when Jack Borcich hollered at him, he didn't say a word.

Q. Well, was that before the collision or afterwards? A. That was after the collision.

Q. Before the collision did you see Milosevich do anything?

A. Yes, he was on the wheel. He swung over hard to port.

(Testimony of Vincent Tudor.)

Q. You saw him do that?

A. He must have. He was the only one up there. We had hit right when that happened. He was the only one up there.

Q. You saw the boat go to port. Did you see Milosevich turn the wheel hard to port? [317]

A. He must have.

Q. Did you see him? A. Yes, I saw him.

Q. You saw Milosevich, with his hands on the wheel, turn hard to port; is that it?

A. Yes, I saw him.

Q. You saw him? A. Yes.

Q. Where was the Bear when you saw Milosevich do that?

A. The Bear was right on us, you might say, maybe 10 feet away.

Q. When you saw Milosevich turn the wheel hard?

A. Turn it hard over; because as soon as it happened it hit. I seen it hit right there. Jack hol-
lered to him, and it hit just when that happened.

Mr. Shallenberger: That is all.

Mr. Callaway: That is all. May this witness be excused?

The Court: Yes, you may be excused.

(Witness excused.) [318]

JACK BORCICH

one of the respondents, called as a witness by the respondents, having been first duly sworn, was examined and testified as follows:

(Testimony of Jack Borcich.)

The Clerk: What is your name?

The Witness: Jack Borcich.

Direct Examination

By Mr. Callaway:

Q. Where do you reside, Mr. Borcich?

A. San Pedro.

Q. What is your business or occupation?

A. Fisherman, skipper of the boat Marsha Ann.

Q. How long have you been skipper of the Marsha Ann? A. For three years now.

Q. Beg pardon? A. Three years.

Q. And how long have you been engaged in commercial fishing? A. 20 years.

Q. How long have you been a skipper of a commercial fishing vessel? A. Since 1936.

Q. Now, first of all, will you tell us the height of the bow of the Marsha Ann from the water line?

A. From the water line to the top, it is about 17½ [319] feet to 18 feet.

Q. And how long is the Marsha Ann?

A. The Marsha Ann is 97 feet long and 24 feet deep and 4 inches.

Q. And what did you have aboard her at the time?

A. 100 ton of water for a ballast, and 5,000 gallons of fuel to use in fishing operations.

Mr. Shallenberger: I didn't get that.

Mr. Callaway: 5,000 gallons of fuel.

Q. (By Mr. Callaway): How much would you

(Testimony of Jack Borcich.)

say she weighed over-all at the time of this collision?

A. It is hard to estimate, but around—my estimate is she weighed around three hundred sixty to seventy tons, I don't know.

Q. Do you recall a collision she had on November 30, 1948, with the Bear? A. I was there.

Q. And where were you on the boat at the time of the collision? A. At the wheel.

Q. Where had you come from?

A. Came from Fish Harbor, to proceed to fishing ground. Just more or less find the fish.

Mr. Shallenberger: Can I have that answer again?

(The answer was read.) [320]

Mr. Shallenberger: Jack, I can't hear you.

The Witness: O.K.

Q. (By Mr. Callaway): Well, as you left Fish Harbor, did you proceed on out the main channel to the breakwater? A. Yes, we did.

Q. How far out of the breakwater were you when this incident happened?

A. We was 600 feet.

Q. At what point on the compass were you headed? A. Southeast.

Q. Was it foggy? A. It was really foggy.

Q. When did you first encounter the fog?

A. We was between the Fish Harbor and the breakwater, and before we got to the fog I called out for the chief to put the radar on.

(Testimony of Jack Borcich.)

Q. Well, prior to the occasion in question, had you had any radar report—— A. Yes.

Q. ——as to the presence of any vessels?

A. Yes, we did.

Q. And when did you get that?

A. When we left the breakwater, we got the—I got a report from the chief just about constantly. He was saying boats are there and boats are [321] there.

To the port he told us there is two boats to the port, and one to the starboard; so when we got out—and, in fact, he told me this, that one boat are kind of changing the course. He is not in a straight course. So I stop.

Q. Did he tell you, prior to the time you stopped, that he had lost this boat on his radar?

A. No, he just was going to go away from the radar screen.

Q. In other words, the boat that he saw was just going away from the radar screen?

A. When I disengaged the engine.

Mr. Shallenberger: Just a minute. May I have the last two or three questions and answers?

(The record was read by the reporter.)

Q. (By Mr. Callaway): Explain what you mean by that, will you?

A. I mean this, I stop the engine completely.

Q. What did you mean about the boat going away from the radar screen?

Mr. Shallenberger: Just a minute. I object to

(Testimony of Jack Borcich.)

that as something not in evidence, and he didn't so testify.

Mr. Callaway: I think that is what he said.

The Witness: No, the boat went away from the radar screen.

The Court: Objection overruled. [322]

Q. (By Mr. Callaway): What did you mean by that?

A. I mean by that when the boat get inside 200 yard on our screen we can't see it no more. Inside 200 yard—up to 200 feet we can keep——

The Court: 200 feet or 200 yards?

The Witness: 200 yards.

The Court: You used both figures; which do you mean?

The Witness: 200 yards.

Q. (By Mr. Callaway): Now, in other words, the radar takes them up beyond a circle of 200 yards?

A. That is right.

Q. Well, when you stopped your engine, disengaged your engine, how fast were you traveling?

A. Well, we just had the engine engaged, but we didn't raise the speed on any controls, because I was right there and I don't let anybody turn the controls when I am in a fog, or whistle. I always keep doing that; that is my job.

Q. I say, how fast were you traveling when you disengaged the motor?

A. Not more than, I would say, mile or mile and a half.

(Testimony of Jack Borcich.)

Q. And how long were your motors disengaged before the collision happened?

A. Well, I would say from six to seven minutes. I really didn't take the time down, but around six minutes. [323]

Q. And during that interval of time, did you hear any whistles from other boats?

A. Oh, yes.

Q. Beg pardon? A. Yes, I did.

Q. Were you making any signals yourself?

A. Yes, I did. I always did.

Q. Well, what signals were you giving within the five or six minutes that you had disengaged your engine?

A. I was giving two signals. Each signal was for four to six seconds, and one second in between, and not longer than a minute and a half apart.

Q. And immediately before you sighted the Bear, did you hear any signal given in the direction from which she came?

A. Yes, I did, but not proper signal.

Q. What did you hear?

A. I heard just like a car horn.

Q. Like what? A. Like a car whistle.

Q. Well, what was the signal?

A. Like this, "Beep, beep," that is all I heard.

Q. How far was the Bear—wait a minute before I ask you that. Had Zankich here given you the bearings of these three boats you described, two off your port and one off your [324] starboard?

A. Yes.

(Testimony of Jack Borcich.)

Q. Do you remember what the hearings were?

A. The one going out of the screen, he told me, was 45 degrees off the port bow; and the next one, that he had it in the screen all the time, it was 45 degrees off our port bow; and one off the starboard bow.

Q. All right; where was the Bear when you first cited it?

A. When I saw it with my own eyes?

Q. Yes.

A. Well, as far as from here to Bortul Zankich.

Q. From where you are to Zankich?

A. That is right.

Mr. Callaway: I suppose, for the record, we can stipulate that is about 25 feet?

Mr. Shallenberger: No, I think it is longer than that.

Mr. Callaway: I get seven steps; you try it, Dave.

Mr. Fall: 21 feet; seven steps.

Mr. Callaway: That is what I got.

Mr. Fall: About 21 feet.

Q. (By Mr. Callaway): Now, before you saw it as far from you as Mr. Zankich, and heard this signal that you heard, did you have any other warning of an approaching vessel from that [325] direction?

A. Yes, I have.

Q. What was it?

A. I heard boat to the port of us and boat to the starboard of us, the whistles.

(Testimony of Jack Borcich.)

Q. Did you have any warning of the approach of the Bear?

A. No, I didn't. I give them four whistles, the danger whistle that we are there, because we are so close that the last whistle I gave them, that was at the time of the impact.

Q. When did you start to give these whistles, before you actually saw them there, or after you saw them? A. As soon as I saw them.

Q. As soon as you saw them. At that time, what was her position?

A. Her position was 45 degrees off our bow, just like this (indicating). This (indicating) is Marsha Ann; and he was coming 45 degrees off our bow. I would like to have the boat.

Q. All right, I will get you the boat.

We will assume that that is southeast.

A. All right. He came just like this (indicating) about 45 degrees, about like that.

Q. Do the captains——

The Court: Just a minute. Is that the way you want the [326] boats when you first saw the Bear?

The Witness: No. When I saw it it was a little farther away, like about that (indicating). Just about like that.

The Court: Now, you got the Bear pointing just a little bit off your bow; is that it?

The Witness: That is right, just a little bit off our bow.

The Court: He has placed the Bear, by the use of the model boats, as being about 45 degrees off

(Testimony of Jack Borcich.)

his port side, and heading on a line which would just pass by the bow of the Marsha Ann but not actually clear the Marsha Ann.

Mr. Callaway: That is right.

The Court: And what was the distance between the two bows at that time?

The Witness: When I saw them?

The Court: Yes.

The Witness: I saw them just from here to where Zankich is at.

The Court: That was the distance between the bows?

The Witness: Yes.

The Court: Not the distance to where you were on the bridge?

The Witness: Just about the same. If I measure from here to here (indicating), it might be couple of feet longer than the other way, if I took a measurement. [327]

Q. (By Mr. Callaway): How far could you see under those particular circumstances, in the fog?

A. Not too far. That is about the farthest I could see.

Q. In other words, you think you saw the Bear as soon as you could see it under the conditions of visibility?

A. That is right, yes, sir.

Q. Well, what happened after you saw her? The minute you saw her you gave the four short blasts?

A. That is right.

Q. And as you were giving the last one, the collision happened?

A. That is right.

(Testimony of Jack Borcich.)

Q. Then what else happened?

A. Well, it bear—what happen? He just turned hard over to the left, and he piled himself on us. That is all I can say.

Q. Was there any forward movement of the Marsha Ann at that time?

A. Well, that would be hard to really—there might have been, on still water, a movement. If the tide would taken it, that is about all. I would say in still water, pretty close in the still water.

Q. In other words, if there was any forward move it was due to the drift? [328]

A. That is right.

Q. Now, what part of the Bear and what part of the other boat came into contact on collision?

A. Well, he started just touching us when he got about this green light, I would say, then he start to swinging hard over; and that is when there really came the impact, when he swung it over.

I don't know if he pulled the engine to speed up or not, but it sounds to me like he did.

Q. Did you say anything to the skipper? Did you see the skipper? By the time of the impact, could you see the skipper on the bridge of the other boat?

A. Well, I seen the skipper, and I told him, "What the hell the matter with you, going in a fog like this, at this speed?"

He didn't answer me one word, just like he was stung, that is all.

Q. How fast do you think he was going?

(Testimony of Jack Borcich.)

A. Well, by the time—by the time he made—he was going pretty fast. I would say he was going 7 miles an hour.

Q. Well, did he ever have any other conversation with you about taking the boat in?

A. I just told him to back up a little bit, so they can come alongside of us, and he did, and we put lines on them, [329] using the 6-inch lines we had when we tie up in rough—like in San Francisco, when there is a big tide, we use those kind of lines. When there is a big surge, we have to use awfully big lines on that boat.

Q. What I am getting at is, during this time you were tying him up, and after you got into Van Camp's Cannery, did he ever discuss the accident, whose fault it was?

A. He wouldn't even talk to me. Just like I murder whole San Pedro, they wouldn't even talk to me. That is the way he act to me.

Q. What did the crew do?

A. Of his boat?

Q. Of the Bear.

A. Well, Bogdanovich, I never saw a man panicky so bad in my life.

Q. Let me ask you this: Did he come over, with a bound, into your bow, Bogdanovich?

A. I don't know, but you have to be a genius to get on top of our bow from this boat.

Q. How much distance is there?

A. About 16 or 17 feet.

(Testimony of Jack Borcich.)

Q. On the back side—or I take it that the entire boat is higher than the Bear, is that right?

A. Oh, yes.

Q. What did you do, throw them lines, or [330] what?

A. We throw them lines, and he back up, and this fellow they said he got up over the bow, he was so panicky he lost a pair of pants between the boats, and he was jumping on the boat. He didn't even help us pull the lines on the Marsha Ann.

Q. Let me ask you this: Regardless of that, did you start up your engine then? I mean, did you engage your engine to come alongside the Bear?

A. No, my engine was stopped all the time. All the time, by the time we tie him up and secure him, and then when I saw that everything was secured then I started up.

Q. How long were you there between the time that you had first stopped or disengaged your engine, until you finally left, towing the Bear?

A. It couldn't be over 10, 12 minutes. I doubt if it was over that, because when we was tying the boat, I don't think it took over five minutes to tie up the boat.

Q. Now, what was the condition of your running lights?

A. Well, my running lights was on, and the mast light was on.

Q. Did you ever tell us who was on the bridge with you?

A. Vincent Tudor and Zitko, Martin.

(Testimony of Jack Borcich.)

Q. Sitko?

A. He spells it with a "Z." [331]

Mr. Rothke: Who was the first one?

Mr. Callaway: Vincent Tudor.

Mr. Roethke: And the second, Zitko?

The Witness: And the chief was on the radar; the chief is Bortul Zankich.

Q. (By Mr. Callaway): Did you have anybody stationed on the bow at the time?

A. Yes, I have Steve Kuljis on the bow.

Q. Anybody else stationed on the boat anywhere?

A. No. I was on the pilothouse with those two fellows, and Steve Kuljis was on the bow, and that is all it requires.

Q. Now, let me ask you, did Zankich here leave the radar, to your knowledge, at any time after you left the breakwater?

A. No, he never do that, unless it is a clear day. When I tell him to put the radar on, he never leave that place. He stays there constantly.

Q. Now, what direction were you outside the breakwater?

A. We was southeast of the breakwater.

Q. I believe you said six or seven hundred feet, or yards?

A. Six hundred feet, not yards. Because we picked up the lighthouse in our radar screen, just on the edge of the radar, and that's 200 yards, that what we pick up, the [332] lighthouse. The breakwater we still——

(Testimony of Jack Borcich.)

Q. What was the rest of the crew doing, do you know? A. You mean on our boat?

Q. Yes, during the time that you were waiting there?

A. Well, some of them was changing clothes inside the pilothouse, and one fellow was down in the hatch washing the hatch—two of them, in fact—and some of them were around the deck.

Q. Had you just brought in a load of fish?

A. That is right. They was washing the hatch.

Mr. Callaway: I think that is all, your Honor.

The Court: Well, it is after 4:00 o'clock. We will take our adjournment.

We will conclude this case tomorrow, will we, your argument and all?

Mr. Callaway: I anticipate so, your Honor.

The Court: Very well.

The court stands adjourned.

The Clerk: At 10:00 o'clock tomorrow?

The Court: 10:00 o'clock.

(Whereupon, at 4:05 o'clock p.m., December 13, 1949, an adjournment was taken until 10:00 o'clock a.m., December 14, 1950.) [333]

Wednesday, December 14, 1949—10:00 A.M.

The Clerk: No. 8960-C Admiralty, Ancich v. "Marsha Ann," further trial.

Mr. Callaway: Ready, your Honor.

Mr. Shallenberger: Ready.

The Court: Had you completed your direct, or do you have any other questions?

Mr. Callaway: I had completed.

JACK BORCICH

called as a witness by and on behalf of respondents, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination

By Mr. Shallenberger:

Q. What is the stem piece of the Marsha Ann constructed of? A. It is constructed of fir.

Q. That is Douglas fir? A. That's right.

Q. Would you hand that boat over? Now, then, the planking on the Marsha Ann—that is the sides—— A. That's right.

Q. ——that runs longitudinally, the same direction as the Marsha Ann, doesn't it? [336]

A. Yes.

Q. And the stem piece runs vertically, up and down, does it not? A. That's right.

Q. Is that stem piece one solid piece or is it more than one piece?

A. It was one solid piece.

Q. Is there a stem iron on the outside?

A. Yes, three by three.

Q. Now, then, the Douglas fir in the stem piece, how far back does that run?

A. That runs behind the planking. I really don't know how much in inches, but it runs quite a bit there.

(Testimony of Jack Borcich.)

Mr. Callaway: I think the photograph shows it, Mr. Shallenberger.

Q. (By Mr. Shallenberger): How is that stem piece fastened, do you know?

A. That stem piece is fastened with planking, nailed on that stem piece, and then you got another piece on the inside, twelve-by-twelve timber, for to fasten the bow stem to that, and that is bolted on both sides, right through the stem.

Q. Now, then, Mr. Borcich, you had just finished unloading fish prior to the time when you left on this trip? A. Yes. [337]

Q. And what time had you finished unloading fish, Mr. Borcich?

A. Oh, I would say about 10:00 o'clock.

Q. And you immediately put to sea after you finished unloading? A. That's right.

Q. Now, then, what time, Mr. Borcich, had you arrived in port with that load of fish?

A. I think we arrived about 7:00 o'clock in the morning, if I am not mistaken.

Q. About 7:00 o'clock in the morning?

A. Yes. I am not sure.

Q. Where had you come from?

A. We came from Oceanside.

Q. You were going back to Oceanside on this trip, is that right? A. That's right.

Q. Now, then, Mr. Borcich, when you came up from Oceanside that morning, did you encounter any fog? A. No.

(Testimony of Jack Borcich.)

Q. No fog? A. No.

Q. At any time on the trip up from Oceanside that morning? A. No. [338]

Q. No fog outside of the harbor? A. No.

Q. No fog inside? A. No, no place.

Q. Where did you unload the fish, Mr. Borcich?

A. French Sardine No. 1.

Q. French Sardine? A. No. 1.

Q. Now, then, Mr. Borcich, when you left French Sardine at around 10:00 o'clock in the morning, was there any fog?

A. When we left the Fish Harbor, that is, about the middle of the bay, it started to get foggy.

Q. About the middle of the bay?

A. That's right.

Q. You mean about half way between Fish Harbor and the breakwater?

A. That's right.

The Court: Can we stipulate how far Fish Harbor is from the lighthouse and the breakwater?

The Witness: Three miles.

Mr. Shallenberger: I think this chart will show it.

The Witness: I think it is about three miles.

Mr. Shallenberger: I would say that is approximately right, three miles. It isn't over that, I am sure.

The Court: Where is Fish Harbor on this map? [339]

The Witness: Right there.

(Testimony of Jack Borcich.)

Mr. Shallenberger: This is Fish Harbor, your Honor, and this is the entrance to the breakwater.

The Witness: I think it is three miles.

The Court: Do you have a ruler there? Where is the scale?

The Witness: Over here.

Mr. Shallenberger: It is about four miles.

The Witness: Two miles.

The Court: One mile and three-quarters.

Mr. Shallenberger: Yes, approximately two miles.

Q. Now, then, you encountered this fog about half way from Fish Harbor to the breakwater?

A. That's right.

Q. Did the fog increase in density from there on? A. Yes.

Q. And the density of the fog increased very rapidly, didn't it, from there on?

A. That is right.

Q. Now, then, did you make any inquiry, Mr. Borcich, of any kind to determine what the weather was outside of the breakwater? A. No.

Q. As you approached the breakwater, the man operating your radar and watching the screen reported a number of boats, [340] did he not?

A. He did.

Q. In fact, if I remember your testimony correctly, you stated he was constantly reporting boats, is that correct? A. Yes, sir.

Q. Who is the man who was making the reports to you? A. Bortul Zankich.

(Testimony of Jack Borcich.)

Q. That is your partner on the boat, the man sitting here at the counsel table?

A. That's right.

Q. What kind of radar set do you have on the Marcia Ann? A. We have a surplus job.

Q. A surplus one? A. Yes.

Q. Purchased from the United States Government? A. Yes, sir.

Q. What type is it? How do you describe it?

A. You mean how does it look?

Q. No. What type of set is it? Those sets have numbers, do they not, showing the model of set that it is? A. That's right. It is a——

Q. Was this an SO-1?

A. I don't think so. I know the make, but I can't think right offhand what the name is. [341]

The Court: Keep your voice up a little bit.

The Witness: I know the name of the set, but I can't really think of the name right now.

Q. (By Mr. Shallenberger): What kind of engine do you have on your vessel, Mr. Borcich?

A. 400-horse Atlas.

Q. 400-horse Atlas? A. Yes.

Q. Is that a direct reversible engine?

A. That is a direct reversible, without no clutch.

Q. What do you do when you are going ahead and you wish to reverse your engine?

A. You stop the engine, and then you have to put it in the reverse.

The Court: You stop the engine?

(Testimony of Jack Borcich.)

The Witness: You stop the engine. You stop the engine completely.

Q. (By Mr. Shallenberger): Then you have to put it in the reverse and start the engine again?

A. That's right.

Q. If you are going forward and you wish to leave the engine running, by disengaging it from the shaft, what do you do? A. You can't do it.

Q. What is that? [342]

A. You can't do it. You have to stop the engine.

Q. You have to stop the engine?

A. That's right.

Q. Then what do you do? A. She stops.

Q. You stand still; you start it up again, or what do you do? A. You have to start the engine.

Q. You start the engine? A. Yes.

Q. And then you start forward again?

A. That's right.

Q. Mr. Borcich, you reported two vessels off the port bow, at a bearing of 45 degrees on your port bow. Who gave you that report?

A. The chief engineer.

Q. Did he take the bearings, also?

A. He knows the bearing, exactly where the boat stands.

The Court: From the radar?

The Witness: That's right.

Q. (By Mr. Shallenberger): Now, then, does he also know the range from the radar?

A. Yes, sir.

Q. Did he report to you what the range was?

(Testimony of Jack Borcich.)

A. Yes. [343]

Q. What was it?

A. When he reported to me what range it was, they was about 700 feet away, and then I stopped the engine.

Q. Now, then, at that time you were still inside the breakwater, is that right?

A. No. We was approaching the breakwater.

Q. But you were approaching it from inside, in the harbor, weren't you?

A. Which?

Q. What?

A. I did not get that right.

Q. When the chief gave you this bearing and range of these vessels on your starboard, you were still inside the breakwater, were you not?

A. Yes. When we saw the boats, yes.

Q. You were still inside the breakwater?

A. Yes.

Q. And that is when you stopped your engine, isn't it?

A. That's right. No, no. Oh, no, no. I did not stop the engine then, no.

Q. I thought you said you stopped the engine when he told you they were 700 feet off.

A. No. I misunderstood that.

Q. All right. When did you stop your engine?

A. When we was—we stopped our engine about, oh, I [344] would say about 600 feet away from the breakwater outside.

Q. About 600 feet outside the breakwater is when you stopped your engine?

(Testimony of Jack Borcich.)

A. That's right. About southeast of the breakwater.

Q. Now, then, Mr. Borcich, when you left Fish Harbor, what course were you proceeding on?

A. When I left Fish Harbor, we were proceeding southeast, one-quarter east.

Q. Southeast, one-quarter east? A. Yes.

Q. Did you change that heading any before reaching the breakwater? A. No.

Q. At what speed were you going when you left French Sardine?

A. When we left French Sardine, we was going slow.

Q. Well, how slow were you going?

A. I would say it was two miles an hour.

Q. Two miles an hour? A. Yes.

Q. Did you change that speed any before you got to the breakwater?

A. Yes. We stopped at least ten times.

Q. You stopped at least ten times?

A. That's right. [345]

Q. Why?

A. Because fog was awful thick and the boats was coming in from the fishing grounds.

Q. In other words, it was about the time of morning when you could expect a lot of boats coming in from the fishing grounds, wasn't it?

A. Yes.

Q. Now, then, when you would start up again after these stops, at what speed would you travel?

A. Oh, I wouldn't say more than a mile.

(Testimony of Jack Borcich.)

Q. You would say what? A. About a mile.

Q. In other words, you traveled about two miles an hour, that is nautical miles per hour, is it?

A. Until it got foggy, yes.

Q. Until you made the first stop?

A. That's right.

Q. And then you made about ten stops?

A. That's right.

Q. And each time when you started up you proceeded at about a mile an hour?

A. That's right.

Q. Now, then, when you first saw the Bear, I believe you state that you gave four short whistles, is that right? A. That's right. [346]

Q. Who gave those whistles? A. I did.

Q. You did personally? A. Yes.

Q. Did you do anything else? A. No.

Q. Did anyone else do anything else on your vessel?

A. I just hollered, but there wasn't anything that you could do.

Q. But did anyone else on your vessel try to do anything else? A. Just holler, that's all.

Q. All right. You didn't direct anyone else on your vessel to do anything, either, did you Mr. Borcich? A. No.

Q. Now, then, from the time that you first saw the Bear to the time of the impact of the two vessels together, how long was that?

A. From the first time we saw it on the screen, or by eye?

(Testimony of Jack Borcich.)

Q. The first time you saw it by eye.

A. Well, it was just right now, that is about all. There wasn't more than just a few seconds. That's all. I couldn't tell you.

Q. Well, have you any opinion as to how many seconds? [347]

A. I would say not more than two seconds, because I couldn't say.

Q. Not more than two seconds?

A. That's right.

Q. How long was it from the time that you first saw the vessels, or the chief first reported the vessels on your starboard bow from the radar screen until the time when you saw the Bear with your eye?

A. Oh, I would say—we would see the boats two or three miles from us when we was approaching the breakwater, but when we got out 600 feet from the breakwater, that was pretty darn close to us then. They just was getting away, and he told me that one boat is not in a straight course.

Q. No. Just a minute, Mr. Borcich. My question was: From the time that Mr. Zankich reported to you that there were two boats off your starboard bow and one boat off your port bow, how long was it from that first report until the time that you saw the Bear?

A. Well, I would say 25 minutes.

Q. 25 minutes? A. 20 to 25 minutes.

Q. Now, then, Mr. Borcich, after that first report, when you received the next report, if any, with regard to these vessels, when was that?

(Testimony of Jack Borcich.)

A. I received a report just about every [348] minute.

Q. Just about every minute?

A. That's right.

Q. What were those reports?

A. Those reports was how many boats he saw and what direction they are from us.

Q. Tell me what he told you.

A. He says, "There is two boats on the port and one on the starboard."

Q. Yes. A. To watch.

Q. He gave you another report the next minute. What was it?

A. That we getting—that they getting closer to us.

Q. The next minute, what report did he give you?

A. That they still coming closer to us and one of them is not in a straight course.

Q. How long after the first report that he gave you was it that he gave you the report that one of them was not on a straight course?

A. How long from the first report?

Q. Yes.

A. Oh, I would say about five or ten minutes.

Q. About five or ten minutes. Now, then, did he tell you which boat it was that was not on a straight course?

A. Well, we can't read the name, which one it is. [349]

(Testimony of Jack Borcich.)

Q. I realize that, but he had been reporting progress of various boats. Did he say which boat it was, what boats he had been reporting?

A. The one approaching in a straight 45-degree, that is one—one was crossing 45 degrees back to our port, well in sight of us, and one was coming straight at us.

Q. Which one of them was it that changed course?

A. The one that was outside of us.

Q. And did he report again on that vessel?

A. Yes, he did.

Q. How long after the report that it changed course did he report again on that vessel?

A. Well, then, at that time he says, "It is getting close to go away from out of sight."

Q. When was that report?

A. That was a report when we was stopped.

Q. Between the time when he told you that the vessel started to change course and this time, he made no reports as to the course of that vessel, did he?

A. I did not get the question.

Mr. Shallenberger: Will you read the question, Mr. Reporter?

(The question was read by the reporter.)

The Witness: No. He did 45 degrees off of the bow.

Q. (By Mr. Shallenberger): Well, he reported to you [350] that the vessel changed course, this one vessel appeared to be changing course?

A. That's right.

(Testimony of Jack Borcich.)

Q. But he made no more reports with regard to that vessel until you were stopped, and he made the report that the vessel was about to go off the screen, isn't that right?

A. Yes. I was at the stop, and he said—when he told me that the boat that was on the starboard is getting close, then I stopped.

Q. At the time you stopped, what was your course, Mr. Borcich? A. Southeast.

Q. Do you remember the compass heading?

A. You mean on the compass?

Q. Yes. A. Southeast.

Q. Do you remember it in degrees?

A. It is one hundred—around 140.

Q. Were you headed—

A. It is 140.

Q. Was that what your compass read? Was that what you were steering prior to the time you stopped? A. Yes, southeast, or 140 degrees.

Q. Still I want to know, Mr. Borcich, were you watching your compass and was that the course that you were steering? [351] A. That's right.

Q. 140 degrees on your compass?

A. That's right.

Q. Is that 140 degrees true?

A. 140 degrees on the compass, that is true, yes.

Q. That is 140 degrees true?

A. That's right.

Q. And not magnetic?

A. No. That is 140 degrees on the compass.

(Testimony of Jack Borcich.)

Q. You know the difference between 140 magnetic and 140 degrees true, don't you?

A. That's right.

Q. What is the difference?

A. It is 140 degrees true.

Q. In other words, if you headed on your compass at 140 degrees, that is 140 degrees true?

A. That's right.

The Court: Is the compass magnetic? Well, go ahead.

The Witness: It is.

Q. (By Mr. Shallenberger): What would be 140 degrees magnetic on your compass?

A. 140 degrees magnetic is southeast. That is what I was going.

Q. And there is no difference on your compass between 140 degrees magnetic and 140 degrees true, is that right? [352]

A. Well, I don't understand that word, to tell the truth. What do you mean? If I say I am going 140 degrees magnetic, I am going southeast. That is the way I can figure it out, but I got——

The Court: Are you through with that subject-matter?

Mr. Shallenberger: Yes.

The Court: I don't like to interrupt.

Mr. Shallenberger: Go ahead.

The Court: You have got a compass on your boat?

The Witness: Yes.

The Court: A magnetic compass?

(Testimony of Jack Borcich.)

The Witness: Yes.

The Court: As you were steering this course, you were watching the needle on the compass?

The Witness: It is——

The Court: Were you watching the needle on the compass?

The Witness: That's right.

The Court: And the needle was pointing to 140 degrees?

The Witness: That's right.

The Court: As shown on the dial of your compass?

The Witness: That's right.

The Court: Then you were steering a magnetic course, 140 degrees magnetic?

The Witness: 140 degrees magnetic, yes.

The Court: How many degrees off would be the true course [353] of 140?

The Witness: It is 140—how much is like when we take the course, it says on chart how many variation——

Mr. Callaway: Speak up. We can't hear you.

The Witness: How many deviations you got on your compass, that many is true.

The Court: How much deviation is there on your compass?

The Witness: There is no deviation on the compass, but I mean when you are making a course, you say 140 degrees magnetic, but if you are not going—if you took a course——

Mr. Shallenberger: I can't hear you.

(Testimony of Jack Borcich.)

The Witness: If you take a course and on the chart it says "15 degrees deviation," you have to take that 15 degrees deviation, and then that is what it is.

The Court: Isn't there a fixed deviation in this area from the magnetic reading to the true reading? Isn't that fixed?

The Witness: On the compass?

The Court: On all compasses.

The Witness: Yes, the compass. Our compass was checked just about, I would say, six months before.

The Court: What is the deviation?

The Witness: There was no deviation on the compass.

The Court: You are talking about a different thing. You mean checking your compass? [354]

The Witness: That's right.

The Court: From true, magnetic reading?

The Witness: That's right.

The Court: And it was correct?

The Witness: That's right.

The Court: But isn't there a fixed deviation in this area around San Pedro Harbor, so the reading of a magnetic compass is not a true reading?

The Witness: That's right.

The Court: And what is that?

The Witness: 15 degrees deviation.

The Court: 15 degrees deviation. All right.

Q. (By Mr. Shallenberger): Well, now, is that deviation or variation? A. Variation.

(Testimony of Jack Borcich.)

Q. The first thing is variation, is it not?

A. Variation, yes, that's right.

The Court: And if a magnetic compass is out of adjustment, that is what you call deviation, is that right?

Mr. Shallenberger: That's right.

Mr. Roethke: Deviation is the disturbance from the ship, such as the presence of steel that affects a true reading of the compass. Variation is because of the area in which you may be navigating.

The Witness: Yes, that's right. [355]

The Court: Can we have him draw a line on this chart as to the course he was taking?

Mr. Shallenberger: I don't see why not.

Mr. Callaway: That's all right.

The Court: First, before you start the line, as you went between the light and the breakwater, do you know where you went through? About the middle?

The Witness: About here.

Mr. Roethke: Why don't you give the track of your vessel from Fish Harbor right through the breakwater, and so forth?

The Witness: That's right.

Mr. Shallenberger: You don't need to do it with the ruler, just free-hand.

Mr. Roethke: That's right, do it the way it will be best for you.

The Witness: This is it. From here, we went

(Testimony of Jack Borcich.)

southeast, because we was going southeast, half east, and then we get to the breakwater.

The Court: In other words, the line you have drawn, from the time you left the entrance to Fish Harbor, was a straight line?

The Witness: Straight line.

The Court: Through the opening, and then continuing straight on? [356]

The Witness: No. Then we change southeast, to southeast.

The Court: You changed. Would you say you swung to the left or to the right as you went through the opening?

The Witness: As we went through the opening, we went left, a little bit to the right.

The Court: Can we draw a southeast magnetic on here?

The Witness: It is pretty hard.

Mr. Roethke: Here is 140. You would have to step it up.

The Witness: No. You have to take deviation on there.

Mr. Roethke: That is a true 140-degree course.

The Witness: That is deviation in there.

Mr. Roethke: When you are correcting for the easterly variation, do you add or subtract from the magnetic?

The Witness: Subtract.

Mr. Roethke: Then what course would you steer to make good a course of 140 true?

(Testimony of Jack Borcich.)

Mr. Callaway: May we have one counsel at a time cross-examining?

The Witness: Wait a minute. If I was going on my compass 140, get me right, I was going on my compass 140. I took the deviation already out.

The Court: You have drawn a line through the compass. Now, mark this as "A," just one "A."

(Witness complying.) [357]

The Court: That is 140 true?

The Witness: That is right.

The Court: Without correction from the deviation.

The Witness: That is right.

The Court: Now draw another line and mark it "B" on here, showing the course for the deviation.

(Witness complying.)

The Court: Now, wait. He has drawn 140 true to start with, by the "A." What he ought to do is to take—get the 140 magnetic first and then work back to true. Can you work out there what your compass reading of 140 is?

The Witness: What 140 is? That would be 155, and then I took off 15, and that would be 140.

The Court: But that would mean your compass was reading 155?

The Witness: No, but I was going 140.

The Court: Magnetic.

The Witness: That's right.

The Court: If you are going 140 magnetic, then the true course is something else.

(Testimony of Jack Borcich.)

The Witness: That's right.

The Court: If your course was 140 magnetic, what would the true course be?

The Witness: The true course would be 155.

The Court: Then draw a line here for 155, and show the [358] 155 on here.

(Witness complying.)

The Court: Mark that "B."

(Witness complying.)

The Court: Now, line "B," so I understand it, is 155.

The Witness: True

The Court: True.

The Witness: And 140 is magnetic.

The Court: And 140 is magnetic, that would be the magnetic reading. So line "A" is the course you were actually following?

The Witness: That's right.

The Court: All right.

Mr. Roethke: If he is steering 140 magnetic, he is not following line "A."

Mr. Callaway: He is following line "B."

The Court: He said "B" was 155 true.

Mr. Callaway: But 140 magnetic. So, in other words, if you notice, this line "B" is actually parallel with the course he has indicated.

The Witness: That is the one I indicated.

Mr. Roethke: But that is not in accordance with his testimony.

The Court: I will study this later. The line "B," then, is 155? [359]

(Testimony of Jack Borcich.)

The Witness: That's right.

The Court: Write "155" there after that.

(Witness complying.)

The Court: And line "A" is 140?

The Witness: 140.

The Court: That is our true, as far as this chart is concerned?

The Witness: That is right. Inside are true, and these outside are not true.

The Court: The inside circle?

The Witness: This inside circle, if I want to go——

The Court: The inside circle you are talking about is this circle here?

The Witness: Yes.

The Court: Mark that "C," just put a "C" there.

(Witness complying.)

The Court: That is, you say, true?

The Witness: That is true compass, and the other one——

The Court: And the outside is the corrected?

The Witness: It would have to be corrected.

The Court: It is not corrected on here?

The Witness: No. This one is true and this one you have to take deviation on it.

Mr. Roethke: Isn't it just the opposite, Mr. Borcich, actually? [360]

The Witness: What do you mean?

(Testimony of Jack Borcich.)

Mr. Roethke: Isn't the outer circle of the compass the true heading?

The Witness: So is this one.

Mr. Roethke: That is the magnetic north heading. You have an easterly variation there of 15 degrees.

The Witness: Easterly variation, all right. Look right here. If I want to take the course east, I take it just like this. There is east, and I don't take no variation whatsoever. If I want to take—if I have to take this one on the outside, I have to vary it this way, but not this one on the inside. If I take a course on this one—if I take a north on this one, this is my course, this is it. Say I am coming from here. I am coming from here and I am steering north. This is my course right here.

Mr. Roethke: That is a magnetic course, then.

The Witness: That's right.

Mr. Roethke: That is not true north.

The Court: I think I can read that now. On your compass, you were steering 140, as you read on your compass?

The Witness: Something around there, because I always try to keep the boat southeast. You can't just keep looking at the compass all the time. You can't look at the compass all the time while you are navigating.

The Court: Do you know when you finally cleared the [361] light, the breakwater?

The Witness: Yes.

(Testimony of Jack Borcich.)

The Court: Did you continue on in the same course you had been following, or did you change to the right or the left?

The Witness: When I got out of the breakwater, I changed just a little, few degrees to the right.

The Court: To the right?

The Witness: To the right. When I got on the——

The Court: I had understood you to say you changed a few degrees to the left.

The Witness: No.

The Court: To the right?

The Witness: Yes, because I was going south-east, one-quarter east from the breakwater.

Mr. Callaway: Your Honor, I think you will find that as far as this diagram, that is not a compass correction, all that is is a correct north, a magnetic north. In other words, that is not a compass correction. A compass correction is governed by conditions of air and a number of other things I don't even know.

Mr. Shallenberger: You are laying out the course on the chart here.

Mr. Callaway: This is the man who was navigating the boat. [362]

Mr. Shallenberger: He can testify when he gets up there. I want to know what this man knows.

Mr. Callaway: Go ahead.

The Court: Go ahead.

Q. (By Mr. Shallenberger): Now, then, Mr. Borcich, what decided you to steer a compass course of 140 degrees?

(Testimony of Jack Borcich.)

A. Because when we got out of the breakwater, we have to go to the first—I always do that, to go east, so we can change the course of the boat towards the fishing grounds.

Q. Did you decide to steer 140 degrees or did someone tell you?

A. Nobody told me to steer 140. I was steering the boat.

Q. It was your decision? A. That's right.

The Court: We were talking about a chart here a few minutes ago. We didn't refer to it by exhibit number. It is Exhibit J, on which the lines and figures were drawn.

Q. (By Mr. Shallenberger): Now, Mr. Borcich, isn't it true that just prior to this collision you had had some engine trouble?

A. To this collision?

Q. Yes. A. No.

Q. Isn't it true that on this day you had trouble with [363] your reverse? A. No.

Q. You had no trouble with your reverse?

A. No.

Q. Before this collision occurred, when was the last time you used your reverse?

A. When I left the cannery.

Q. And you didn't use it again until the time of the collision? A. I did not use it at all.

Q. You didn't use it at the time of the collision? You didn't use it after the collision?

A. After the collision, I did use it.

Q. When?

(Testimony of Jack Borcich.)

A. When we landed the boat on Van Camp dock.

Q. What did you use the reverse for then?

A. To stop it.

Q. Did you have any trouble with it?

A. No.

Q. At that time, did the Bear also use its reverse?

A. Not when we came on the Van Camp.

Q. Did it at any time prior to that use its reverse, that you know of?

A. You mean after that?

Q. No, before that. [364]

A. You mean the Bear?

Q. Yes.

A. He did. He backed up when I told him to come alongside of us.

Q. What kind of a fog whistle do you have on the Marsha Ann?

A. Air whistle.

Q. How big a whistle is it?

A. It is a four-inch whistle.

Q. By "four-inch" you mean the diameter across the bell of the whistle?

A. The diameter where the disk is.

Q. Where the disk is?

A. Yes.

Q. That is the vibration disk you are talking about?

A. That's right.

Q. Do you know what the diameter of it is across the bell or the mouth?

A. I really don't know. I think it is around six inches, something like that. I really don't know.

Q. How do you run that whistle?

(Testimony of Jack Borcich.)

A. By air.

Q. How many pounds air do you use?

A. Well, we have electric—how many pounds?

Q. Yes. [365]

A. I really don't know how many pounds it takes to run one of them.

Q. You don't know how many pounds of pressure you use when you blow that whistle?

A. Not very much.

Q. Well, would you say 10 pounds or 100 pounds?

A. Well, I don't know how many pounds exactly it takes.

Q. Well, that to a certain extent determines the amount of noise the whistle makes, doesn't it?

A. Oh, yes, it does make plenty of noise.

Q. But doesn't your air pressure determine how much noise it is going to make?

A. That is right.

Q. And your whistle makes a lot of noise, is that right?

A. That's right.

Q. Did you observe the whistle on the Bear?

A. I observed the whistle on the Bear, but very faintly.

Q. Did you observe the whistle on the Bear?

A. Did I see it?

Q. Yes. A. You mean on his mast?

Q. Yes. A. Yes, I did. [366]

Q. It is the same type whistle you had, isn't it?

A. No.

Q. What was the difference?

A. It was different than mine altogether.

(Testimony of Jack Borcich.)

Q. It was an air whistle, wasn't it?

A. Yes. They have all kinds of air whistles.

Q. Beg pardon?

A. They have all kinds of air whistles.

Q. Did you notice what size whistle it was?

A. It wasn't very big. The stem was long, but it was awful narrow.

Q. Now, then, if I understand your testimony correctly, Mr. Borcich, on this particular day you were at the wheel?

A. That's right.

Q. And you were operating the wheel, the engine room control, and blowing the whistle when necessary, is that right?

A. Well, I tell you——

Q. Well, is that right or isn't it, Mr. Borcich? All you have to do is tell me yes or no.

A. When I was controlling the—I was controlling the wheel, whistle, and just the controls that pull the speed, that's all.

Q. Those are all the controls that there are up there, aren't they? [367]

A. No.

Q. What other controls are there?

A. The other controls are to start the engine and to kick it ahead, to start and stop it.

Q. And you weren't operating those?

A. No, I was not operating that.

Q. Who was? A. Martin Miskulian.

Q. He was operating that? A. Yes.

Q. And Mr. Zankich was operating the radar?

A. That's right.

(Testimony of Jack Borcich.)

Q. Mr. Borcich, what time did you serve lunch aboard your ship that day?

A. I really can't remember that. I am not sure if—I think we serve when we brought the Bear in by the cannery. I am pretty sure that we did.

Q. Isn't it a fact, Mr. Borcich, that you served lunch right after you finished unloading the fish at French Sardine?

A. No.

Q. You didn't?

A. No.

Q. When did you have breakfast that morning?

A. When I got up. [368]

Q. Well, when was that?

A. When we came on the breakwater.

Q. What time was that?

A. Oh, I would imagine about 6:30.

Q. Did the rest of the crew have breakfast at that time, too?

A. No.

Q. When did they have breakfast?

A. I don't know.

Q. Do you know whether they had breakfast or not?

A. Well, to tell the truth, no, because some guys eat breakfast and some guys don't.

Q. Mr. Borcich, how long was it from the time you stopped until you saw the Bear with your eyes?

A. Oh, I would say from five to six minutes, maybe more. I really can't—

Q. Maybe more, maybe less?

(Testimony of Jack Borcich.)

A. No, not less than the—I don't think we was less than five or six minutes there.

Q. How do you arrive at that five or six minutes, Mr. Borcich?

A. I have a clock right there and—well, the length of time, we was just—because I remember giving two whistles. Twice I give whistles, and I figure that is about five or six minutes in [369] between.

Q. Twice you gave whistles, and you figure that is five or six minutes, and that is the way you arrive at the five or six minutes, is that right?

A. Yes.

Mr. Shallenberger: That's all.

Mr. Callaway: That's all.

The Court: I would like to ask a question or two, and counsel may object to any of these questions, if you want to.

Mr. Callaway: If I think they are not proper, I will.

The Court: This particular morning, you had come back from Oceanside?

The Witness: That's right.

The Court: And you loaded your boat with fish down around Oceanside?

The Witness: That is about 150 miles.

The Court: You had come in early?

The Witness: Well, your Honor, the boat we have, if we caught fish an hour after the other boats, we would beat them in anyway, you see, because we have got lots of speed, and they have—

(Testimony of Jack Borcich.)

The Court: Was there any fishing going on out in the channel between Catalina and San Pedro that morning?

The Witness: There might have been. There was. You see some boats work outside between Catalina and San Pedro, off any port, off Point Vicente, and all over. [370]

The Court: But fishermen generally go to the place where the most fish are being caught?

The Witness: That's right.

The Court: And most of the fish were being caught down around Oceanside?

The Witness: That's right.

The Court: After you clear the light, between the light and the breakwater, is there any reason that you can't immediately take a course of about 90 or 100 or 110 degrees and start right back down to Oceanside?

The Witness: Yes, your Honor, you can, but——

The Court: What I am getting at is, why did you turn right after you got out of the harbor, rather than turning left?

The Witness: I turned right, because when we are going to Oceanside, I got out a little bit on account of Dana Point, I like to be outside there three or four miles when we are going down there, if it is possible.

The Court: When you go down to Oceanside and come out of the light and the breakwater, do you always take a turn right instead of left as you get out of the breakwater?

(Testimony of Jack Borcich.)

The Witness: Well, when it is clear you don't have to, because this other breakwater over here, the pleasure boats usually fish on the bank there, and we don't like to go into the bunch of little boats in the fog. [371]

The Court: They generally fish where?

The Witness: Right off the breakwater, a new breakwater, the breakwater that is east is the new breakwater.

The Court: East of the light?

The Witness: That is right.

The Court: Most of these boats you saw in the radar were coming in toward the harbor?

The Witness: That's right.

The Court: At about, oh, somewhere between, say, true north 270 and 300, weren't they?

The Witness: That's right.

The Court: Heading for the breakwater?

The Witness: That's right.

The Court: Isn't there less hazard in approaching another boat if you approach the boat when you are going about the same course, meeting head on, rather than meeting crossways?

The Witness: Well, to tell the truth, when it is really foggy, you can sometimes come alongside and you don't see each other.

The Court: All right. But in heavy fog, wouldn't there be less hazard if there is a bunch of boats coming toward you in heavy fog, wouldn't there be less hazard if you headed into the boats along the same

(Testimony of Jack Borcich.)

line they were following, rather than cut across the boats? [372]

The Witness: In that matter, it might be, but——

The Court: I don't know. I am just asking you. You tell me what you think.

The Witness: It might be, but I figure the boats was to the left of us, so we generally keep going a little southeast and then turn down.

The Court: But your radar showed boats off of your port and off of your starboard, both.

The Witness: That's right, but there was only one on the starboard and he was—he looked like he was going—like the chief tell me, he says, "Well, there is one on the starboard going to pass us there right away," because he was coming from a west direction, he was coming from a point——

The Court: The boat that finally hit you came from the port side?

The Witness: Port side.

The Court: Now, I have another question. You say you stopped the boat about ten times?

The Witness: That's right, inside the break-water.

The Court: You mean that you stopped the engine?

The Witness: That's right.

The Court: You never did put your engine in reverse and bring your boat to a stop?

The Witness: No.

(Testimony of Jack Borcich.)

The Court: How big are the windows of your pilot house? [373]

The Witness: Oh, I would say one and a half by two.

The Court: Is there some space covered up by wood and frame in between the windows, as in this model?

The Witness: Just a little ways.

The Court: Just as there is in the middle here?

The Witness: That's right.

The Court: In other words, there is almost as much space between the windows as there is windows.

The Witness: Oh, no, no. The space between the windows is from four to six inches, and the window is about a foot and a half wide and two feet high.

The Court: Was there a lot of fog on your windows that morning, of the pilot house?

The Witness: Yes, but that was escaping from inside.

The Court: You were inside?

The Witness: I was right there.

The Court: Out of the pilot house?

The Witness: That's right.

The Court: Where was the engineer? Inside?

The Witness: He was inside, and this window is open here and we could hear him.

The Court: He was talking to you from the inside?

The Witness: That's right.

(Testimony of Jack Borcich.)

The Court: And you were on the outside?

The Witness: Yes. [374]

The Court: All right. That clears that up.
Thank you very much.

Mr. Callaway: Do you have any more?

The Court: No.

Mr. Shallenberger: There is one more question I have.

Q. (By Mr. Shallenberger): How much fish did you bring in on that load to French Sardine?

A. I think we brought the limit, and I can't remember what the limit was that day. I am pretty sure we brought the limit that day. I don't know what the limit was, but I think we brought the limit, some place around there. I do remember that.

Q. In other words, French Sardine had their boats on limits? A. That's right.

Q. And you think you brought the limit?

A. That's right. Everybody did.

Mr. Shallenberger: I have no further questions.

The Court: You may step down.

(Witness excused.)

The Court: We will take a short recess.

(Short recess.)

The Court: You may proceed.

Mr. Callaway: Mr. Zankich. [375]

BORTUL ZANKICH

called as a witness by and on behalf of the respondents, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Bortul Zankich.

Direct Examination

By Mr. Callaway:

Q. Mr. Zankich, are you one of the owners of the Marsha Ann? A. I am.

Q. How long have you been one of the owners?

A. Three years.

Q. What position do you occupy among the crew, or did you occupy on November 30, 1948?

A. Engineer, navigator, and radar operator.

Q. What kind of radar set did you have?

A. A Rayathon, SO-1.

Q. Did you have that in operation before your collision with the Bear on that day? A. Yes.

Q. About what time did the collision happen?

A. 11:00 o'clock by our clock.

Q. Where were you when you first started using the radar?

A. Right after we left the harbor, we saw a fog ahead. [376] I didn't see the fog, but Jack called me up to get the set going.

Q. Did you know how the set operated?

(Testimony of Bortul Zankich.)

A. Well, it is similar to a television and it has a sweeping arm from the center. There is a beam of light. It just sweeps around like the dial of a clock.

Q. Like a lighthouse light?

A. Well, it is just like a line, a line of light sweeping around from the center to the outside of a circle. It continually sweeps around a circle, and, well, if an object is directly ahead, as this light sweeps across that circle, it leaves a mark on the screen.

Q. How far away from you will it pick up such an object? A. 200 yards.

Q. Anything that gets any closer than that to you, you cannot see on the radar, is that right?

A. That's right.

Q. When did you first put this radar set in operation? You say you were about half way from Fish Harbor to the breakwater? A. Almost.

Q. Did you see any boats?

A. Yes, there was boats going in and out. I could see the boats coming out of the fog and other boats going into [377] the fog, going out.

Q. When did you first pick up, where was your boat when you first picked up the boat that eventually turned out to be the Bear?

A. Well, probably I had him on the screen right away, but he wasn't in the area where we would start worrying about him until we got to the breakwater.

Q. How far away will the radar show objects?

(Testimony of Bortul Zankich.)

A. Well, we have four ranges, four-mile range, 20-mile range, and 80-mile range.

The Court: Can you tell the course or direction of a boat by the radar?

The Witness: Yes, you can tell the course and direction and its speed, if you have enough time to figure it out.

The Court: How can you tell the course and direction, by a series of dots?

The Witness: It keeps changing location.

The Court: A dot appears on the screen, and as the light sweeps around the second time, does another dot appear?

The Witness: Yes.

The Court: Is the first dot still there?

The Witness: Yes.

The Court: On the third sweep, does a third dot appear?

The Witness: That's right.

The Court: Are the first two dots still [378] there?

The Witness: They are fading out.

The Court: About how many dots are visible at one time in the case of a moving object?

The Witness: Well, you wouldn't call it exactly a dot. It is—well, the boat may have a picture like a grain of rice on the screen, and if the boat is moving ahead, that grain of rice will be brighter in the direction the ship is moving. The head will be brighter, while the back end is fading out.

The Court: It leaves a kind of streak made up of a series?

The Witness: Yes.

(Testimony of Bortul Zankich.)

The Court: The brighter end indicating the direction of movement?

The Witness: Yes.

The Court: Can you tell the size of the object by the size of the dot?

The Witness: Yes, I can tell. It takes experience to do that from the different sizes of boats, but you can tell what they are, like fishing boats all have the same characteristics as to the markings.

The Court: So you can practically chart the course of an object that is in front of you.

The Witness: Yes.

The Court: All right. Go ahead. [379]

Q. (By Mr. Callaway): Where were you seated in the operation of this radar?

A. In the wheelhouse, looking at the screen, radar screen.

Q. Where was Borcich? A. At the wheel.

Q. Was that on the outside?

A. That is on the outside of the house.

Q. Did you notice anything unusual on the radar in connection with this boat that eventually, you say, you knew to be the Bear?

A. Yes. He was changing course.

Q. By that, what do you mean?

A. Well, he didn't have a constant direction. He was going one direction for a while, and then he would swing and change. I think he was looking for the light. He knowed where the light was, but he probably couldn't get its true direction in the heavy fog.

(Testimony of Bortul Zankich.)

Q. Well, tell us what happened in that connection, in connection with those observations. Did you report them to the skipper? A. Yes.

Q. Well, did the Bear eventually pass out of the observation you could make of it on the screen?

A. Yes, it did. [380]

Q. Tell us where your boat was at that time.

A. Well, we were abeam of the breakwater when I told Jack that there was one boat off, between one and two points off the starboard bow, and two boats 45 degrees to port. He stopped then, because I also notified him one of the boats to port was erratic in its direction.

Q. Did you continue to observe the boat?

A. Yes, I did. I was observing all three boats, because they were getting pretty close.

Q. Did you proceed on out from the breakwater?

A. He stopped the engine, just about, well, I would say we just passed it.

Q. Where were you when the collision happened?

A. At the radar.

Q. What? A. At the radar screen.

Q. Where was the boat?

A. Oh, pardon me. Well, I would say we were maybe a quarter of a mile from the light. I could see the lighthouse on the screen. It was in the visible area.

Q. In what direction were you headed?

A. Southeast.

Q. Let me ask you this. Did you start the engine up again at the breakwater and move on out

(Testimony of Bortul Zankich.)

to where you were, you say, a quarter of a mile away? [381] A. I didn't start the engine.

Q. I don't mean you, but did whoever was operating the boat?

A. No, I didn't hear the engine start any more after we passed the breakwater, when it stopped after we passed the breakwater.

Q. Did you tell the captain to stop?

A. I told him it would be safe to stop because of the indefinite course of the boat on the port.

Q. What I am getting at is, how did your boat get from the breakwater out a quarter of a mile?

A. The boat has way on it.

Q. When did you first see the Bear with your eye? A. After the collision.

Q. How long would you say it was after the motor of the boat was stopped before the collision?

A. Well, I have no way of judging that, only by guess.

A. Well, just approximate it, if you can.

A. Well, it may have been five minutes, more or less.

Q. Before the collision, did you hear any whistle signals being given by your boat? A. Yes.

Q. What did you hear?

A. I heard the—after we come out of the light or before? [382]

Q. After you came through the breakwater?

A. Well, we had stopped the engines after we passed the breakwater, and was giving two blasts.

(Testimony of Bortul Zankich.)

Q. What kind of blasts, prolonged or short blasts?

A. Maybe four or five seconds to a blast.

Q. How far apart?

A. Maybe a minute and a half, two minutes at the most, not more than two minutes.

Q. Did you hear any signals from other boats around?

A. Yes, I could hear the whistles from other boats, inside where I was, yes.

Q. I beg your pardon?

A. I could hear the whistles from other boats, inside where I was.

Q. Did you hear any signal, or whistle signal, in the direction of the Bear, immediately before the collision?

A. I don't know the directions. I mean I can't tell the direction it was coming from.

Q. Let me ask you this. What was the first thing of an unusual nature that attracted your attention just before the collision?

A. Well, it was yelling.

Q. It was yelling?

A. I don't know. It sounded like everyone was yelling.

Q. Did you come out of the pilot house immediately [383] after the collision happened?

A. Yes.

Q. Where was the Bear then?

A. It was at our bow.

(Testimony of Bortul Zankich.)

Q. Was there any forward movement of your boat at the time of the collision?

A. I couldn't see any.

Q. What?

A. I couldn't see any forward movement.

Q. Did the Marsha Ann propel the Bear through the water broadside? A. I doubt it.

Q. She was not broadside when you saw her?

A. No.

Q. What position was she in?

A. Well, she was still swinging, the boat was still swinging, his stern was coming towards our port side.

Q. Do you know whether or not, Mr. Zankich, there was anybody stationed at the bow of the boat just before the collision?

A. Yes, Steve Kujlis was at the bow.

Q. Can you, Mr. Zankich, tell us why it is safer to stop under conditions such as you have described than it is to proceed in the direction of an oncoming boat?

Mr. Shallenberger: I object to that, Your Honor, as [384] calling for a conclusion.

The Court: Overruled. He is experienced.

The Witness: Well, you can stop your engine and still maintain what is called boat under way. Engines can be stopped and the rules of the road say you are still under way as long as you hold your course. So that is why it is safe to do so.

Q. (By Mr. Callaway): How many times, if you remember, did you give the skipper a report on

(Testimony of Bortul Zankich.)

these two vessels that were approaching on your port?

A. I think I was practically talking continuously.

Q. Did you give him the range of the boats?

A. Yes.

Q. Did you give him the position?

A. Position and range, yes.

Q. Was that done up until the time that the Bear passed off your screen and within the 200 yards?

A. It was done even after that. It was done on the other boats.

Q. In other words, you continued to give him——

A. Yes, I told him that the Bear—I didn't know it was the Bear at the time, but I told him one of the boats on the port was out of sight, in a blind spot, and to watch for him, and that the others were still O.K., they were traveling in. [385]

Q. Was the Bear the boat that was not holding its course, that you saw on the screen?

A. Yes. That is what I concluded towards the end, because the other boat I continued to see until he disappeared inside the breakwater.

Q. How long have you been connected with commercial fishing boats in navigation?

A. Well, I started in 1933. I was out during the war for six years.

Q. By the way, after you had towed the Bear in, and so on, did you go on out fishing?

(Testimony of Bortul Zankich.)

A. After we left it at the shipyard, we proceeded to the fishing grounds, yes.

Q. In other words, there was nothing about your boat that prevented its operation?

A. No, sir.

Q. Was the damage confined to the stem being bent, as is shown on these photographs? You have already seen them.

A. Yes, I have seen them. That was it.

Q. Is that right? A. Yes, sir.

Q. Just before the collision happened, did you hear any unusual whistle signals from your boat?

A. Yes. I heard the danger signal.

Q. What is that? [386] A. Four blasts.

Q. Short or long?

A. They are not long. The danger signal is pretty quick.

Mr. Callaway: You may cross-examine.

Cross-Examination

By Mr. Shallenberger:

Q. Mr. Zankich, how did you arrive at the decision that four blasts of the whistle is a danger signal? A. I read it in the rules.

Q. Is that one of the rules?

A. I couldn't state positively, no.

Q. By "the rules," are you referring to the international rules of the road? A. Yes.

Q. Is there any other reason for believing four whistles or four blasts is a danger signal?

A. No.

(Testimony of Bortul Zankich.)

Q. Keep your voice up a little bit. I can't hear you.

Now, then, Mr. Zankich, showing you this model vessel, would you tell me where the radar screen is located? A. Inside of this wheel house.

Q. Inside of this top wheel house?

A. That's right.

Q. Where inside of the wheel house? [387]

A. Well, just, you go through the chart room, there is a chart room on that side, and the skipper's room is on this side. It is in the skipper's room.

Q. In other words, there is a room on the port side of the wheel house? A. Yes.

Q. And there is a room on the starboard side of the wheel house? A. Yes.

Q. And it is in the room on the starboard side of the wheel house?

A. Yes, and midships, that is, practically midships.

Q. In other words, the wheel house is divided into three compartments, is that right?

A. That's right.

Q. Now, then, where in the skipper's room on the starboard side of the wheel house is the radar screen located?

A. In the center. It is in the—well, the partition between the chart room and the skipper's room.

Q. It is on the longitudinal partition between the two rooms? A. Alongside of it.

Q. Alongside of it?

(Testimony of Bortul Zankich.)

A. Yes. Some of the equipment is hanging on that partition. [388]

Q. Well, are there other parts of the radar equipment at other places in the room?

A. Yes. Parts of it are all over the boat.

Q. Well, I mean in that particular room.

A. Well, some hangs from the ceiling, some is hanging from the partition.

Q. Well, is the screen on the partition?

A. The screen hangs from the ceiling.

Q. Alongside the partition? A. Yes.

Q. Then, in order to observe the screen and what goes on on the screen, you would have to face the partition, is that correct?

A. No, I face the screen.

Q. But isn't the screen in the same relative position as the partition?

A. No. The screen—my back is towards the bow of the boat when I face the screen.

Q. Your back is toward the bow of the boat when you face the screen?

A. I am sitting at the door.

Q. You are sitting at the door?

A. Yes, sir.

The Court: The door into the skipper's compartment?

The Witness: The door into the skipper's compartment. [389]

Q. (By Mr. Shallenberger): With your back to the bow of the boat?

A. Back to the bow of the boat.

(Testimony of Bortul Zankich.)

Q. Now, can you do everything that is necessary to operate the radar from that position?

A. I can.

Q. How big is the screen, Mr. Zankich?

A. I believe the tube is eight inches. I have never measured it.

Q. Is that eight inches in diameter?

A. In diameter, yes.

Q. Is that a circular tube?

A. Circular, yes.

Q. And these points of light on the tube that you mentioned, how large are they?

A. Well, the fishing boat makes about—well, about the size of a grain of rice.

Q. I beg your pardon?

A. About the size of a grain of rice for a fishing boat, purse seiner.

Q. And for a battleship?

A. Well, a battleship will—it depends on the size of the ship. A large ship will make a large mark.

Q. Make relatively larger marks?

A. I have seen battleships make, well, almost a mark [390] as large as a jelly bean.

Q. Now, then, you started operating the radar screen, as I understand it, about half way between Fish Harbor and the breakwater; is that right?

A. Yes. Not quite half way.

Q. A little before half way?

A. Before half way.

Q. And you immediately started seeing vessels on the screen, did you not?

A. That's right.

(Testimony of Bortul Zankich.)

Q. How many did you see?

A. I didn't count them.

Q. Did you see one vessel or ten vessels?

A. Well, maybe twenty, maybe more. I didn't count them.

Q. But you saw numerous vessels?

A. I did.

Q. In other words, there could be ten or twenty or thirty? A. That's right.

Q. As you proceeded toward the breakwater, did you continue to see numerous vessels?

A. Yes.

Q. In other words, the screen was practically dotted with vessels, isn't that correct?

A. Yes, to port, starboard, behind us. [391]

Q. Behind you, ahead of you, port and starboard? A. That's right.

Q. Now, that condition continued after you got out of the breakwater, too, did it not?

A. Behind us, yes. There were numerous boats behind us then. Just three ahead.

Q. There were only three vessels that you could see ahead when you got to the breakwater, is that right? A. On the four-mile range.

Q. On the four-mile range?

A. That's right.

Q. Did any other vessels come on the screen in addition to those three, between the time you reached the breakwater and the time of the collision? A. No.

Q. No other vessels but those three?

A. No.

(Testimony of Bortul Zankich.)

Q. Any vessels behind you, on the screen at that time? A. There were boats coming out.

Q. Could you see those boats?

A. Yes, but they are behind us. You are not worrying about them.

Q. No, but they were on the screen, weren't they, Mr. Zankich?

A. Yes, they were on the screen. [392]

Q. Now, Mr. Zankich, coming out of the harbor that morning, after you got into the fog—Strike that question.

When you first got into the fog, which was in the harbor, did you hear the whistles of any other vessels? A. Yes.

Q. How many vessels would you say you heard the whistles of?

A. I don't know. Numerous.

Q. But there were numbers of them, you would say, from the sound, would you not? A. Yes.

Q. And as you proceeded on to sea, you continued to hear numerous whistles, did you not?

A. Until we got to the breakwater. Then there weren't so many after the breakwater.

Q. But when you left the breakwater, you did continue to hear whistles, did you not?

A. Yes.

Q. Did you determine how many whistles you heard after you got to the breakwater?

A. No.

Q. You couldn't tell whether it was from one boat or a dozen boats, could you?

(Testimony of Bortul Zankich.)

A. No. I wasn't paying any attention to it.

Q. In other words, had you been paying attention to the [393] whistles, could you have told how many boats they were coming from?

A. If I had been outside and concentrating on it, I believe I could.

Q. Now, then, from the time that you started the radar in operation, did you remain in the radar room from that time until the time of the collision?

A. I did.

Q. Was anyone else in the radar room with you?

A. No.

Q. Was anyone in the wheel house, to your knowledge? A. Inside the wheel house?

Q. Yes. A. No.

Q. Was anyone in the skipper's room?

A. I was in the skipper's room.

Q. Well, the other room that is next to it.

A. The chart room?

Q. The chart room. A. No.

Q. Was anyone in the chart room? A. No.

Q. Now, then, Mr. Zankich, I wonder if you would be kind enough to make a little diagram, sort of a floor plan of the wheel house, showing where the things are that you [394] have been describing.

A. (Witness complying): This is the chart room, and the skipper's bed is here.

The Court: What is this here?

The Witness: This is the radio, the transmitter,

(Testimony of Bortul Zankich.)

receiver, facing over here. The controls are in the wheel house.

Q. (By Mr. Shallenberger): Now, this opening here into the chart room is a door? A. Yes.

Q. And the opening shown in the forward part of the chart room is a door?

A. That is a door, yes.

Q. And I assume that the curved line indicates the direction of the bow of the vessel.

A. That is the bow, and the wheel is here.

Q. Where was the radar screen?

A. This is the radar screen.

Q. This is the radar screen?

A. It is almost flush with the door. I stand here.

Q. Will you write up here "Forward part of flying bridge"? A. (Witness complying.)

Q. Will you draw a line from this out here and put "Radar," just write "Radar."

A. (Witness complying.) [395]

Q. And then will you draw a line from this "X" and put "Zankich"?

A. (Witness complying.)

Q. Will you draw a line from here out here and put "wheel"? A. (Witness complying.)

Mr. Shallenberger: I would like to offer this in evidence, your Honor.

The Court: It will be admitted in evidence as libelant's exhibit next in order. That will be 13 in evidence.

(The document referred to was marked Libelants' Exhibit No. 13 and received in evidence.)

438

Case No. 8960-Cadm.Ancich vs. "Marsha AnnLibelants EXHIBIT 13

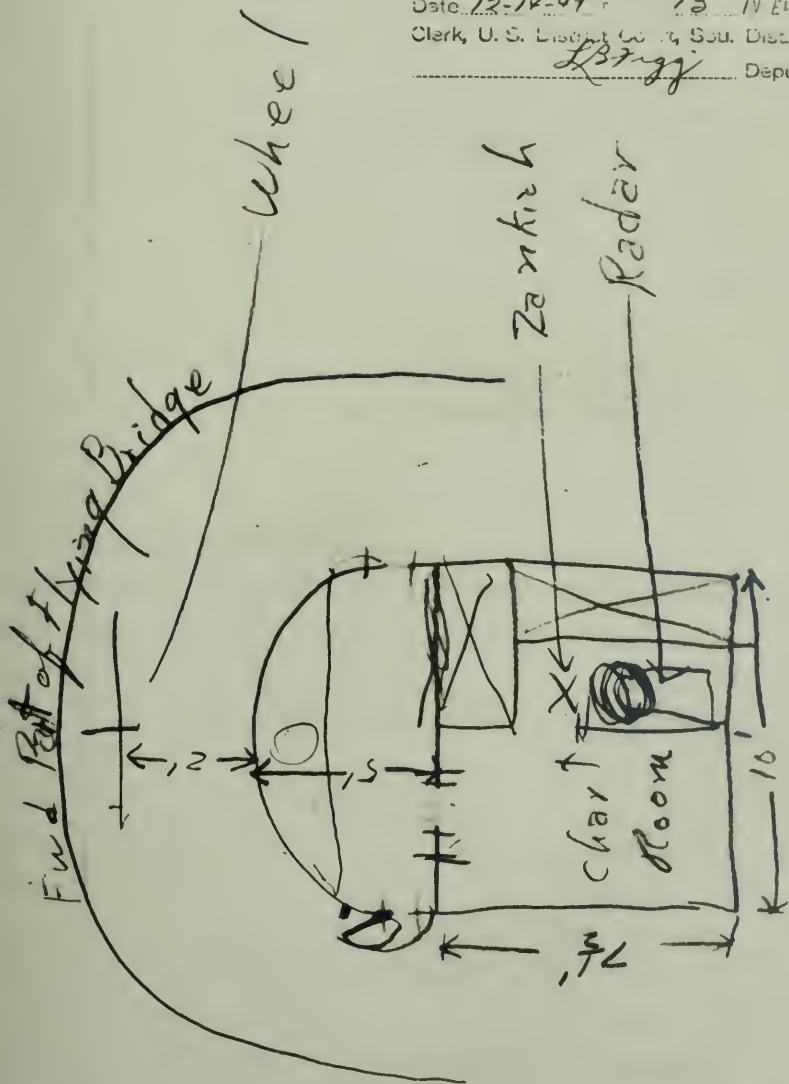
Date _____ No. _____ IDENTIFICATION

Date 12-14-49 13 IN EVIDENCE

Clerk, U. S. District Court, S. D. Cal.

LB Trigg

Deputy Clerk



The Court: I would like to find some dimensions. How deep is the chart room from the doorway to the back in feet?

The Witness: Maybe seven and a half feet.

The Court: Will you put that there.

(Witness complying.)

The Court: And how wide is the entire cabin?

The Witness: I would say ten feet.

The Court: How far is the wheel forward of the front, curved portion of the cabin?

The Witness: There is room for a man to stand there.

The Court: Just room for a man to stand?

The Witness: Yes. I would say two feet. Shall I put that in there? [396]

The Court: You can put that in there.

(Witness complying.)

The Court: What is the distance between the inside of the curved portion of the pilot house back to the partition?

The Witness: Oh, let's see. There is a shelf, maybe five feet.

The Court: And the compass?

The Witness: Yes. The compass is, say, five feet.

The Court: How many windows are in this curved portion, all the way around?

The Witness: All the way around? The door opens in this direction, and from almost where the door would hit, it is continuous all the way around to where this door comes.

The Court: All right.

(Testimony of Bortul Zankich.)

Q. (By Mr. Shallenberger): Now, then, Mr. Zankich, you have testified that you kept up a continuous conversation with the skipper from the time that your radar went into operation until the time of the collision?

A. Yes. I continuously observed and talked about what I observed.

Q. What did you tell the skipper?

A. I reported positions and ranges and directions of other boats.

Q. And did the skipper converse with you?

A. Well, he would ask questions. [397]

Q. What would he ask you?

A. Well, if we were in the clear, if there was anybody approaching us too fast, or anything like that.

Q. Now, then, from the time that you stopped the engine, or that the engine was stopped, from that time on to the time of the collision, what conversation did you have with the skipper?

A. I continued to give positions of boats.

Q. What boats did you give him the position of?

A. Well, there was a lot of boats. We stopped many times before we got to the breakwater.

Q. I mean from the time that you stopped your engine outside of the breakwater?

A. Well, the boat that turned out to be the Bear seemed to be one of the most concern.

Q. All right. What conversation did you have with the skipper?

A. I told him to look out for one of the boats

(Testimony of Bortul Zankich.)

that was on the port bow, one of them was coming into the circle and getting too close.

Q. Mr. Zankich, showing you Respondent's Exhibit J, will you indicate where with relation to the entrance to the breakwater the vessel was when the engine was stopped for the last time?

A. Well, we just came abeam and passed. [398]

Q. You just came abeam and passed the light?

A. The light, maybe we passed it a couple hundred yards.

Q. Maybe you passed it a couple hundred yards and then turned the engine off? A. Yes.

Q. Now, then, you heard Mr. Borcich testify he changed course after he got out of the breakwater. Where was the vessel when Mr. Borcich changed course? A. It was abeam of the light.

Q. In other words, when the vessel was abeam of the light is when Mr. Borcich changed course?

A. Yes, as far as I could see it then. He only changed maybe five degrees, sir.

Q. Do you know how wide the opening of the breakwater is there? A. 2,000 feet.

Q. Is there a channel going through there or is the whole 2,000 feet navigable?

A. The whole 2,000 feet is navigable except—well, you can pile up on the rocks, of course. You can't touch the breakwater.

Q. Are there any rules for which side a vessel entering that breakwater shall use?

A. Coming out, stand to the right, close to the right.

(Testimony of Bortul Zankich.)

Q. Coming out, you are supposed to stand to the right, [399] close to the light?

A. That's right.

Q. Going in? A. On the other half.

Q. You would use the other half?

A. That's right.

Q. Now, then, it is true that the limit of the radar that you had is 200 yards, as far as seeing objects that are closer than that?

A. That is the nearest on that model, yes.

Q. Are there any other limitations?

A. Distance.

Q. Are there any limitations other than distance?

A. No. I don't know what you mean?

Q. Is it possible that there is such a thing as a blind spot? A. No.

Q. In other words, within the range of distances, from 200 yards to whatever mileage you have it adjusted for, there are no blind spots?

A. That's right. Could I take that back. You could have a blind spot behind another object.

Q. In other words, two objects could be coming in the same direction, one behind the other, is that it, and you wouldn't see the second one? Is that what you mean? [400]

A. If the object is a great mass, like two boats of this type, they could be one behind the other and you would pick up both of them, but you take a battleship and you put this behind the battleship, and you won't pick up this boat, because nothing shows of it. There isn't anything you can see of it.

(Testimony of Bortul Zankich.)

The Court: The radar works on a line of sight, then?

The Witness: Yes. It is a straight——

The Court: Straight beam?

The Witness: Yes.

Q. (By Mr. Shallenberger): Now, then, where was the Marsha Ann, Mr. Zankich, with relation to the harbor and the breakwater, when you first picked up the boat that you concluded eventually was the Bear?

A. Oh, I guess he was on the screen as soon as I turned it on. Maybe not. I don't know.

Q. How did you decide that this one vessel which you noticed on the screen was the Bear?

A. After the collision.

Q. In other words, that boat went off the screen, and at the time it went off it was at a bearing which was about the bearing that the Marsha Ann and the Bear came together on, is that right?

A. Yes. There were no other boats in the blind spot but this one boat. [401]

Q. It came out of the fog and at the Marsha Ann when at about the bearing you had last seen it, is that right?

A. Yes.

Mr. Shallenberger: That's all.

Mr. Callaway: That's all.

The Court: Can I borrow the little blocks?

Mr. Callaway: Yes.

The Court: We can finish with this witness before lunch, probably.

These two blocks, the smaller one is supposed to

(Testimony of Bortul Zankich.)

represent the Bear and the other is the Marsha Ann. You felt the impact of the collision, did you?

The Witness: Yes.

The Court: Did you immediately leave your room to see what had happened, step outside?

The Witness: I ran out the port side door. I thought somebody had hit us in the side.

The Court: You were out there and you saw the boats, the Bear and the Marsha Ann, in collision, immediately after you felt the impact?

The Witness: Yes.

The Court: At that time, show me the position in which the bow of the Marsha Ann and the side of the Bear were in contact.

The Witness: Well, when I came out—— [402]

The Court: After they hit, where were they?

The Witness: After they hit, I came out on this side, the port side, and I observed the Bear swinging this way.

The Court: And the first moment you saw the Bear before the beginning of the swing, what was the position of the Bear and the Marsha Ann?

The Witness: I would say, when I saw it, it was just about like that.

The Court: The witness is indicating the bow of the Marsha Ann about midships of the Bear and with the Marsha Ann a little less than perpendicular, that is, the bow of the Marsha Ann is swung around a little closer to the bow of the Bear.

The Witness: The point of impact was aft—I

(Testimony of Bortul Zankich.)

think just a little behind amidships. It was aft of——

The Court: You got a good look at the Bear, did you?

The Witness: The stern, yes.

The Court: Was the Bear lying even in the water or was the Bear lying sideways in the water?

The Witness: It looked to me like almost on an even keel.

The Court: It was almost on an even keel?

The Witness: Yes.

The Court: I would like to ask that same question of Mr. Borcich. You saw the Bear immediately after the impact? [403]

Mr. Borcich: Yes, I did.

The Court: Was the Bear on an even keel from side to side, or was the Bear tipped over a slight bit to one side?

Mr. Borcich: It seemed to me like he was on a full even keel.

The Court: That is all the questions I have.

Mr. Shallenberger: Nothing further, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: We will take our noon adjournment at this time. Before we adjourn, though, are we going to finish this today?

Mr. Callaway: I will try hard.

The Court: Off the record now.

(There was a discussion between Court and counsel off the record.)

The Court: We will take our adjournment now.

(Whereupon, a recess was taken until 2:00 o'clock p.m., of the same day.) [404]

Wednesday, December 14, 1949, 2 P.M.

Mr. Callaway: Call Mr. Williams, please.

ARTHUR WILLIAMS

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Arthur Williams.

Direct Examination

By Mr. Callaway:

Q. What is your business or profession, Mr. Williams? A. Marine surveyor.

Q. How long have you been connected with——

Mr. Shallenberger: I will stipulate to his qualifications, Mr. Callaway.

Mr. Callaway: Thank you. I won't go into any great detail.

Q. How long have you been connected with the shipbuilding industry and construction and designing of ships?

A. Including an apprenticeship, about 35 years.

Q. And you are connected with what office?

A. Wilvers & DeFever of San Pedro.

(Testimony of Arthur Williams.)

Q. Did you have occasion at the instance of the respondents in this case to make a survey—Strike that— [405] to act as an observer during the repairs effected on the vessel Bear commencing in December, 1948, and continuing until it was completed?

A. I was called in attendance on the Bear about the middle part of December, along about the 17th or 18th.

Q. Had any work been done on it at that time?

A. Yes, there was; she was already on the ways at the Harbor Boat Works at San Pedro and side-tracked, and work was in progress of being repaired.

Q. Did you continue to attend during the repairs?

A. I was in attendance until January 11th, at which time I left for Honolulu.

Mr. Roethke: Mr. Williams, will you keep your voice up, please, toward the end of the sentence.

Q. (By Mr. Callaway): It has been testified here, Mr. Williams, that sometime after the repairs had all been effected that you agreed as to the figure of \$17,770 and some cents with Mr. Sims and Mr. Rados of the boat yard. Will you explain that, please?

A. When the vessel was finished and the repairs had been completed, I was in the office of Mr. Rados at the Harbor Boat Shop, and Mr. Sims and Mr. Al Rados were also in attendance, and they were discussing the price of repairs of the vessel Bear, at which time the price was \$17,700 something, and

(Testimony of Arthur Williams.)

they asked me if I thought that was a fair [406] price for the repairs on that vessel. I concurred that it was a very fair price for the amount of work that had been done on the vessel, but I did not agree that the repairs effected on the vessel were attributed to an accident which I was called on to survey.

The Court: Did you state that? Did you say that you did not agree, or was that a mental feeling you had?

The Witness: No, I stated that in their presence, that I was not agreeable to that price, but was certainly agreeable to the price for the amount of work performed on the vessel.

Q. (By Mr. Callaway): When you saw the Bear on the ways, what did you observe about her condition?

A. When I went on the job, a large portion of the starboard side had been removed, and the condition of the frames, especially, were in a very rotten condition. When I say "rotten," I mean definitely a dry rot or a length-of-time rot.

Q. Do you have in your possession, and have you had in your possession any pieces of the wood that were taken out?

A. Yes, I took the opportunity to pick up some of the pieces of the frames of this vessel.

Q. Do you have those with you?

A. Yes. [407]

Q. Will you produce them, please?

(Testimony of Arthur Williams.)

Those were marked by you at the time?

A. Yes.

The Court: If you offer these in evidence, let's give them a mark for identification before you start talking about them.

Q. (By Mr. Callaway): How many do you have, Mr. Williams?

The Clerk: Three.

Mr. Callaway: I offer them in evidence, if the Court please.

The Court: All right. Any objection?

Mr. Shallenberger: I don't think so. I don't think any further foundation is necessary. I know Mr. Williams' reputation.

The Court: They will be received in evidence and marked Respondents' Exhibit next in order.

The Clerk: Respondents' Exhibits L, M and N.

(The objects referred to were marked respondents' Exhibits L, M and N, and were received in evidence.)

Q. (By Mr. Callaway): With reference to Exhibit L, is that part of the frame?

A. It is a portion of a frame here taken at the end where she is usually steam-bent, showing the condition where [408] some fastenings had gone through.

Q. The fastenings you see on Exhibit M, what does that indicate to you, the condition of the fastenings?

(Testimony of Arthur Williams.)

A. Right here is definitely a case of pure deterioration over a period of time (indicating).

Mr. Callaway: Indicating the nails or spikes, whatever you want to call it, on Exhibit M.

The Court: What is Exhibit M, what kind of piece is that?

The Witness: Piece of the bottom planking.

The Court: Planking on the hull?

The Witness: Yes.

Q. (By Mr. Callaway): Referring to Exhibit N, will that hold a nail at all?

A. Well, I think that question is answered right there, sir. I wouldn't say that it would hold a fastening.

The Court: What is N, what does it come from?

The Witness: Part of the framing.

Mr. Shallenberger: I don't know where the nail came from that Mr. Callaway fitted in there.

The Witness: It happens to be one of the fastenings of the vessel, sir.

The Court: By "framing," do you mean the ribs?

The Witness: Yes.

The Court: What thickness are the ribs? [409]

The Witness: That is a laminated rib there, and that is two 1 $\frac{1}{8}$ by 2 sections. However, that frame here is a full 2 by 3 framing, steam-bent.

The Court: How often in your experience could the side boards be taken off and nailed by on the same frames? Is there any number of times that could be done?

(Testimony of Arthur Williams.)

The Witness: Yes, it could be.

The Court: How many?

The Witness: It depends upon the condition of the frame, sir, how much it has been opened up by driving all the fastenings into the ribs, how much of a hole it would cause. It could stand about three times.

The Court: It is no different a problem than any carpenter would have in driving a nail to fasten one board onto another, is it?

The Witness: That is right.

The Court: In other words, if you drive a nail in and you hit a crack or knot-hole and it doesn't hold, you pull it out and drive it in somewhere else where it will hold, you can tell by the way the nail drives in whether it has been driven into another hole or whether it is being driven into solid wood?

The Witness: That is true. But if you take and drive a nail in here toward the edge of this board it certainly weakens this member; but if you drive it to the center here, [410] which is usually one-third of the distance from the edge, that is the good nailing spaces. You would get a nail to hold right on the very edge, but it would certainly weaken the frame.

Q. (By Mr. Callaway): Did you find this condition to be general throughout the Bear or was it just in isolated spots?

A. That condition was general throughout.

Q. Do you know how many of the ribs of the Bear were replaced or had sister frames inserted?

(Testimony of Arthur Williams.)

A. For the repairs?

Q. That was done on it, yes.

A. Yes, on the starboard side there were approximately 44 to 46 replaced; on the port side there were 44, what we term as the stub frame on the port side.

Q. What portion of the entire vessel did that involve?

A. That involved approximately from what we term frames 22, or about the 22-foot mark from the bow of the boat to almost 75 per cent of the length.

Q. In other words, 75 per cent of the length of the boat on both sides the frames were replaced, is that right?

A. No. Approximately 75 per cent on the starboard side frames were replaced by steam-bent frames running as far down as possible between the skin of the ship, the outer skin or the planking and the ceiling. On the port side 44 frames, or approximately 75 per cent of the length of the [411] ship was replaced in the bilge only, which were stub frames and averaged anywhere from 18 inches to 3 feet long. Those were sawn and not steam-bent.

Q. When the port side of the vessel was opened up, what did you find?

A. When the port side of the vessel was opened up we found that the entire bilge, which is the heaviest part of the vessel, or where the steam-bending frame takes the heaviest bend, the entire area was broken all the way through.

(Testimony of Arthur Williams.)

Q. In your opinion was that the result of this collision in any way? A. Definitely not.

Q. What was it the result of?

A. That was the result of just breaking over a period of time, possibly a strain from steam-bending, which very often is the case in steam-bending frames, you will fracture a frame in bending.

Q. So that we may understand what you are talking about, let's take the model and show us where these last frames were replaced on the port side.

A. On the port side of the vessel here, from here, this section in here, to here (indicating).

Q. All under the water line?

The Court: Indicating from the portion immediately below the light to the portion at the end of the guard rail. [412]

The Witness: Right. This section in here, from here to here, right at the water line was the fractured section.

The Court: Was there a similarly fractured section on the starboard side?

The Witness: On the starboard side it was fractured in here, also, but these frames in here were broken right in this area here (indicating).

The Court: Were the fractures around in the bilge that you are talking about, did they exist similarly on the port and starboard sides?

The Witness: Yes.

The Court: With the exception of these that you have just indicated that were broken up where the

(Testimony of Arthur Williams.)

collision occurred?

The Witness: Yes, they did.

Q. (By Mr. Callaway): Mr. Williams, did you have any discussion one way or the other with Mr. Sims about what repairs were to be effected, and why they were to be effected?

A. No, sir, none at all.

Q. Did you ever demand in this instance an itemized statement?

A. I called for an itemized statement from Harbor Boat Yard in order that we may finalize our report on the job. That was called for just after the job was completed, and we received a summary of the job for the total amount of [413] the cost of the repairs. However, the bill was not itemized as we requested or wished to have it, and we called them and requested an itemized statement.

Q. Did you ever get it? A. No, sir.

Q. Did you ever see an itemized statement?

A. No, I did not.

Q. I mean, you saw one that I handed you?

A. I saw one here this morning which you gave me around about 10:00 o'clock this morning.

Q. Let me ask you this question: In your opinion did the boat need these repairs that you have mentioned as being around the bilge, before any collision with any other boat?

A. That, sir, is a very hard question to answer in this——

Mr. Shallenberger: Just a moment, your Honor. I am going to object to that because it assumes a

(Testimony of Arthur Williams.)

fact which is not in evidence. There is not sufficient foundation for this man to answer that question.

The Court: I am going to sustain the objection on another ground. The way the question is framed, it is the question that the Court has to, probably, ultimately decide, were these repairs necessary as a result of this collision, did they need these repairs before the injury happened. [414]

You may inquire into the subject-matter, but I will sustain the objection to the way the question is framed.

Q. (By Mr. Callaway): After examination of this boat and statements, what, in your opinion, in dollars—first of all, I will ask you this: What in your opinion was the physical damage occasioned to the Bear as a result of this collision?

A. The physical damage, as I saw it, was the starboard side of the vessel damaged abreast of the pilot house at the after end of the pilot house, and that damage involved broken planks, ribs, bulwarks, the rail, portion of the rigging, the deck was jarred loose and the knees on the inside were jarred loose, and the hatch was strained.

Q. What, in your opinion, in dollars predicated upon what the Harbor Boat Works charged for all the work, would it cost to have made those last-mentioned repairs?

A. Those last-mentioned repairs, as I stated here now, I omitted one thing in that, also, on the port side the planking showed evidence of springing, that is, the seams were loose, and I would like to answer

(Testimony of Arthur Williams.)

it this way: If we were going to do the job and wrote it up for that amount of repairs to be done, we would have estimated—at least I would have estimated in the neighborhood of \$6500, or maybe \$7,000.

Q. By the way, on what basis was this work performed—on [415] a flat contract, cost-plus, or what?

A. That was on a time and material basis.

The Court: Do I understand you to say in going over the list of repairs that you say were the result of a collision, about the only thing that you haven't mentioned, at least generally, was the matter of these ribs, there may have been some other matters, but the major things you mentioned were included in the testimony of the other expert, do you mean to say that the putting in of the stub ribs, 18 inches to 3 feet in length, and the sister ribs on the other side, would come to \$10,000?

The Witness: No, sir. There are several other items in there. On the alignment of the engine, the length of time on the ways, the entire caulking of the deck.

The Court: You say the deck was strained and jarred loose?

The Witness: Yes.

The Court: That means you would have to caulk the deck, wouldn't you?

The Witness: Not the entire deck. It would depend upon the examination and how much would be arrived at.

(Testimony of Arthur Williams.)

The Court: What other major items would have to be taken into account?

The Witness: The alignment of the engine would be a major item, alignment of the intermediate shafting, which [416] would come under the alignment of the engine, that is another major item. Cleaning and painting is a major item.

The Court: Supposing you were doing that job or were supervising a job of that kind, and the boat would be stripped down to where you could see the condition of the ribs as you say they existed, and at the time you started the job that wasn't included in the price, but they said, "Why don't you go ahead and put those stub ribs in on the port side and the sister ribs on the starboard side, how much additional would that run the job, those two items?

The Witness: I think a safe figure there would be around about \$40 a frame.

The Court: By a frame you mean either a sister rib or a stub rib?

The Witness: Yes. That would be a general average.

The Court: Are you taking into account now that the boat has been stripped down, part of the hull is already off, the interior ceiling, or boards on the inside were off, it is all in a position to be worked on, you have to plank and cut the stubs for the sister ribs and you have to put them in?

The Witness: Right.

The Court: That would still be \$40 a frame?

The Witness: That would be a liberal estimate

(Testimony of Arthur Williams.)

The Court: Liberal which way? [417]

The Witness: For instance, in steam-bending frames there, you may break several in the course of bending.

The Court: That is all. Go ahead. Apparently it costs money to repair boats.

Mr. Callaway: Yes, it does. To build them, too.

Q. (By Mr. Callaway): Showing you Libelant's Exhibit 6, is that deck planking rotten or just disturbed? A. No, that planking is disturbed.

Q. What about the planking you see missing on the inside of the ribs there, is that rotten? That is Exhibit A, Respondents' A.

A. This section shows signs of being rotten, this here is definitely a break (indicating), this section here is rotten, this is rotten and split, this here is over-fastening, here is nominal fastening right here (indicating).

Q. In your opinion, would that portion of the boat need replacing before the collision?

A. I would rather answer that another way, if you don't mind.

Q. Go ahead.

A. If the boat was going up for sale and I were going to be the buyer, I would certainly request that to be replaced. We know that there are several boats on the ocean today that have very bad conditions, but nobody knows them. Maybe the master knows them, maybe some part of the crew knows [418] them, but there are several afloat that are in bad condition.

(Testimony of Arthur Williams.)

Q. Do you consider them unseaworthy?

A. Yes, sir, I do.

Q. What, in your opinion, Mr. Williams, was the reasonable time necessary to effect the repairs occasioned by this collision?

A. If the job had been set up for bids and put out for a bid for three yards, which is customary at times, I would estimate 35 days.

Q. I am not talking about effecting all the repairs; I am talking about those repairs which in your opinion were occasioned by the collision.

A. Occasioned by the collision, 25 working days.

Q. What do they work—a five-day week?

A. Five-day week.

Q. In other words, what you are talking about is that the boat yard guarantees completion within the period of time that you mention? In other words, where you put them up to bid——

A. A time requirement is requested at all times.

The Court: Is work impeded by rainy weather?

The Witness: The contractor, if he takes the bid on the job and he estimates the time on the job, he is held to that time.

The Court: That doesn't answer my question. He may be [419] held to the time, but in making the estimate does he take into account whether he can or cannot work on rainy days?

The Witness: Yes, as a rule he does.

The Court: And is it true that you can't work on rainy days?

The Witness: Outside work you can't work.

(Testimony of Arthur Williams.)

However, in a vessel you can work inside, you can work on the interior of the hull, certain crafts could work.

The Court: If the work was being carried on, that is, outside work, you would have to suspend during the rain?

The Witness: Yes.

Q. (By Mr. Callaway): Would you have to let it dry out after the rain, or could you start in again?

A. You would not necessarily have to wait. You could start in again.

Mr. Callaway: You may cross-examine.

Cross-Examination

By Mr. Shallenberger:

Q. Mr. Williams, you estimated 25 working days for the work that you believe to be necessary as a result of this collision, and you stated that would be true if the job were let out on bids, say, from three different yards, and I assume the low bid would take it—is that correct?

A. Not necessarily so, no. Putting a job out to bid or asking other yards to submit figures, the time requirement [420] is in there, and usually it is based on the time and the price. A yard may be a low bidder and he may want 10 days longer to do the job. However, the other yard may come out with a lower time and a slightly higher figure. Then that would be at the owner's request as to where it would go.

(Testimony of Arthur Williams.)

Q. All right. Mr. Williams, are you familiar with the Harbor Boat Building Company?

A. Yes.

Q. And you have been familiar with them in your work over a considerable period of time?

A. Yes.

Q. Do you regard them as a reputable yard?

A. I certainly do.

Q. Do you regard their work as good work?

A. Yes.

Q. Do you regard them as efficient?

A. Yes.

Q. Now, then, taking the job as they did, on a time and material basis, Mr. Williams, what would be your estimate of the number of days necessary to complete the work on the Bear that you determined to have been caused by the collision?

Mr. Callaway: May I have the question read, please?

(The question was read by the reporter.)

A. I am still not quite clear on the question.

Q. (By Mr. Shallenberger): Would you like it read again, Mr. Williams?

A. Yes. Not necessarily read, maybe—can you phrase it a little differently?

Q. All right. I will reframe it. Mr. Williams, you testified that the Harbor Boat Building Company took this on a time and materials basis, is that correct?

A. Right.

Q. Now, then, on that basis, how long do you

(Testimony of Arthur Williams.)

believe it would have been necessary at that time for the Harbor Boat Building Company to have completed the amount of work you have determined was necessarily caused by the collision?

A. I still think the job could have been done in the 25 days.

Q. I don't believe that is an answer to my question. Is it your answer that 25 days—is that the answer to my question?

Mr. Callaway: That is the answer he gave you.

The Court: No. He said the job could have been done. The question is what was a reasonable time for the Harbor Boat Yard on a time and material basis to complete the work, the repair of the damage he found to be caused by the collision.

The Witness: When I went on the job a large portion of the job was opened up already, therefore other work was [422] in progress. I would say—for instance, caulkers were working on the job at that time. This portion of the boat here (indicating) was opened up, and the work was going into effect. At that time with that particular job on the starboard side, I will still say that 25 days would have been a fair estimate, 25 working days.

Q. (By Mr. Shallenberger): Do you mean, Mr. Williams, that certain work having been done when you appeared on the job, that 25 days would be all that is necessary?

Mr. Callaway: Do you mean by that, Mr. Shallenberger—

Mr. Shallenberger: Perhaps the witness can an-

(Testimony of Arthur Williams.)

swer the question. If he doesn't understand it, he can tell me.

Mr. Callaway: I know you have no disposition to confuse him. Do you mean 25 more days, or do you mean 25 days in all?

Mr. Shallenberger: I think the question is intelligible. Would you read it again, please, Mr. Reporter?

(The question was read by the reporter.)

The Witness: Yes, after the boat was pulled up on the ways and the inspection made and the amount of work determined from that collision, 25 working days should be fair.

Q. (By Mr. Shallenberger): If the job were taken by the Harbor Boat on a time and material basis?

A. No, I don't quite get that question. I am sorry. That doesn't ring quite clear. [423]

Q. Mr. Williams, is the answer that you just gave me based upon the fact that the Harbor Boat Building Company was taking the job on a time and material basis? A. No.

Q. All right. What is it based on?

A. It is based on a time—if I were estimating that job, and figuring that it should go out to bids, that I would consider——

Q. Mr. Williams, perhaps I haven't made myself plain; I am sorry. I have no intention of confusing you. The premise of all of the questions, the whole group of questions that I have just finished asking you, is that it is not out on bid, that it is

(Testimony of Arthur Williams.)

on a time and material basis. Now, then, assuming that it is on a time and material basis, and that the Harbor Boat Building Company is going to do it, what in your opinion would be the length of time that would be necessary to do the repairs that you regard to be a result of this collision?

A. 25 working days.

Q. All right. Does that include the time of hauling her on the ways, inspecting her and determining what there is to be done? A. No.

Q. How many days would that take?

A. That I cannot answer you because I did not see the [424] condition of the boat prior to the 17th of December.

Q. As a matter of fact, Mr. Williams, you had never seen the Bear at all under any circumstances before the 17th of December, had you?

A. That is correct.

Q. And a while ago when you stated the condition of the vessel about the bilge area, that was based upon your seeing the vessel for the first time on the 17th or 18th of December, and after that, is that true? A. That is right.

Q. Not from any surveys made previous to that time or before the accident? A. Correct.

Q. And without reference to any survey made prior to that time? A. Correct.

Q. Then you would be unable to give me an estimate of the amount of time that would be necessary to haul the boat and inspect it and determine what was done, would you?

(Testimony of Arthur Williams.)

A. I could give you an approximate time to haul the boat, yes, but prior to the hauling of the boat what condition she was in, no, because I had not seen it.

Q. Mr. Williams, in your determining that it would take 25 working days exclusive of looking the vessel over and hauling it, I assume that 25 working days if the vessel were [425] put out on bid would be the same 25 working days, that wouldn't take into account the time for hauling and inspecting and so forth, would it? A. No.

Q. It wouldn't take into account the time necessary to get the bids in, either, would it?

A. No.

Q. Or for the bidders to inspect the vessel to base their bids, would it? A. No.

Q. Now, then, will you explain to me, Mr. Williams, why, when you made your original answer of how many days it would take, you said if it were put out on bids? Is there any difference?

A. I am afraid I don't follow you, again.

Q. All right. You stated 25 days to Mr. Callaway in answer to his question as to how long it would take to do these repairs that you considered to be necessary as a result of the collision, and then you qualified it and stated if it was put out on bid and the shipyards were called in to bid upon it. Now, what is the difference as to whether it was put out on bid, or as to whether it was given to one yard on a time and material basis?

A. If the vessel was to be put out for bid for certain repairs, the vessel would have to be in a posi-

(Testimony of Arthur Williams.)

tion for any [426] inspection to be made, and in this particular case the vessel would have to be on the ways for examination. Then, after the bids are let, the time is counted from the time the bid and the vessel is accepted into the yard of the contractor.

Q. Is that the only reason that there might be some difference between the number of days on a bid job, and the number of days on a time and material job?

A. Do you mean on the length of time for the boat coming up for inspection, or do you mean pertaining to the job itself after the job has been inspected and ready to go to work?

Q. We will assume, Mr. Williams, that the job has been inspected and they are ready to go to work, the bid let and the bidder ready to go to work, now, then, is there any difference in the number of days that bidder would take or would be reasonably necessary and the number of days that a party ready to go to work on a time and material basis would take? A. Yes.

Q. All right. What is that difference?

A. When a vessel is put out to bid, a contractor is usually penalized for the time that he runs over. A job that is on a time and material basis is certainly not under penalty. In the usual course of work going through any yard at all it is not customary to keep one entire crew [427] on that particular job, the work fluctuates in the yard and it

(Testimony of Arthur Williams.)

is necessary to pull a crew off and put them on other jobs.

Q. You were in and about this ship for a considerable period of time during December and January; do you believe that if the Harbor Boat Building Company had this job on a bid that they would have taken a lesser number of days to do the job?

A. I think they could have done it faster with a confirmed time element there, yes.

Q. But not faster than 25 days? A. No.

Q. In other words, when you give the estimate of 25 days, Mr. Williams, you are first of all leaving out the time necessary to obtain bids or to haul the vessel or to inspect the vessel, and you are assuming that the boat yard is going to put all the men they possibly can on that vessel without them getting in each others way, to finish it in just as short a number of working days as possible, is that true?

A. That is true.

The Court: I don't know whether you were asked this or not: You would also have to allow time, would you not, to open up the inside and outside in order to see what the damage was before estimates could be made? [428]

The Witness: Yes.

The Court: And, also, is there any practice as to the length of time that a shipbuilding yard takes in making the bid? Supposing you called a shipbuilding company to come in today to look at a vessel that was on the ways and had been opened up

(Testimony of Arthur Williams.)

and ready for inspection, how long a time would ordinarily be taken before you would get a bid back from them?

The Witness: In a case where it goes out to bidding, sir, usually a time is designated for the bid to be opened, which would normally be anywhere from a 24-hour period to maybe 3 days or 4 days.

The Court: In other words, it is fairly short, from 1 to 3 or 4 days?

The Witness: Yes.

Q. (By Mr. Shallenberger: Now, then, Mr. Williams, when were you first notified of the fact that the Bear was damaged, and that your office was called upon to attend?

A. When our office was called upon to attend?

Q. Yes.

A. The only thing I can refer to there is the notes that I have prior to my going on the job.

Q. All right. Do you have those?

A. That was on November 30th, I believe.

Q. November 30th, 1948? [429]

A. Right.

Q. But I believe your testimony is that your first visit was on December 17th or 18th?

A. Yes, sir.

Q. Now, then, you stated you were in attendance until January 11th? A. Right.

Q. 1949? A. Yes.

Q. Did you see the Bear after that time?

A. I saw the Bear in the month of February, around the 14th or 15th.

(Testimony of Arthur Williams.)

Q. That was when she was finished?

A. Yes, she was already in the water at that time.

Q. Now, then, Mr. Williams, you stated that when you viewed the Bear the condition of rot was general. Now, to what did you refer? Did you refer to the vessel generally or to certain portions of the vessel?

A. Mostly the framing, ribs.

Q. In other words, the framing, the ribs, that is the same thing, isn't it?

A. Yes.

Q. What did you mean by "rotten"?

A. A dry rot condition, soft.

Q. What is a dry rot condition? [430]

A. A soft, pulverized.

Q. All right, anything else?

A. No.

Q. Now, then, does that condition appear uniformly through the piece of timber, or is it in spots?

A. It can be spotted.

Q. In fact, it usually is spotted, is it not, Mr. Williams?

A. Yes, usually spotted.

Q. And in this case it was spotted, wasn't it?

A. Throughout the bilge it seemed to be fairly even.

Q. Fairly even spotted or fairly even throughout the timber?

A. Spotted throughout the bilge section on each timber.

Q. Did you bring any of that timber?

A. Only what we have here.

Q. Is that all from the bilge?

A. No. This here is a portion of the planking (indicating).

(Testimony of Arthur Williams.)

Mr. Shallenberger: All right. That is referring to Exhibit M.

Q. (By Mr. Shallenberger): Where did Exhibit L come from?

A. A portion of the after framing, right about the after end of the hatch here, I would say. [431]

Q. Not from the bilge area?

A. This can be termed—the whole area from here to here is termed as the bilge area.

Q. By that area you mean from at about the water line on back?

A. Right.

Q. Then this was taken from the bilge area?

A. Yes.

Q. Will you point out to me where the rot exists, if it does, in this exhibit?

A. Right through here (indicating).

Q. You wouldn't call that soft, would you?

A. I wouldn't call it soft, no, I wouldn't call it soft, but I certainly wouldn't say there was any life in the timber.

Q. You wouldn't call it pulverized, would you?

A. This section here, I would say, is not pulverized. Though here you have this condition (indicating). This here was definitely a break (indicating).

Q. This particular rib is not in bad shape, is it?

A. Not too bad, except for the fastenings through here.

Q. Let's stay on one subject. I will get the fastenings in a moment.

A. All right. [432]

(Testimony of Arthur Williams.)

Q. A rib or a frame is not necessarily a strength member of a vessel, is it?

A. Oh, yes, it is a strength member of the vessel.

Q. It is not a principal one?

Q. Not a principal one.

Q. In other words, as long as it can hold the planking and the fastenings it is performing its principal service, is it not, to the vessel?

A. Yes.

Q. What kind of wood is this?

A. That is oak.

Q. That is bent oak? A. Bent oak.

Q. Referring to the holes here, I assume those were made by the fasteners? A. Yes.

Q. I note that along most of these holes there are little split areas, up and down near the holes; that is customary in spiking bent oak, is it not, that there be little splits? A. Yes.

Q. No matter how new the oak is?

A. Right.

Q. Or how steam-bent, or anything else? There seem to be a number of holes up and down here, and I assume that [433] that is what you referred to when you said it showed overfastening, is that right?

A. Not in this particular case here, this is not overfastening. I was referring to a picture there.

Q. I will get the picture. In other words, this rib has not been over-fastened? A. No.

Q. But if you were to take the planking off and were going to put it back on, or put the new planking on, would you still want to use a rib with as

(Testimony of Arthur Williams.)

many fastening holes in it as this?

A. If the timber is in good condition you would plug these holes and refasten on the same timber.

Q. How many times could you do that, Mr. Williams? A. About three times with success.

Q. Would you say that the ribs taken from the area that this rib, this piece of rib Exhibit L, is taken from, were all in about the same condition as this Exhibit L?

A. No, I would not. Through the bilge area at the water line the fractures and the broken parts showed this condition here (indicating), or at the sub end of that end there (indicating).

Q. Which side, on the port side or starboard side? A. Both port and starboard.

Q. When you say they were in a broken condition, you [434] mean they were broken in two, is that correct? A. No.

Q. What do you mean?

A. Broken condition can be a fracture, which we would term as a broken frame.

Q. All right. Was that a tranverse fracture or longitudinal fracture?

A. That was a transverse fracture.

Q. Could that fracture occur from a blow?

A. On the port side of the vessel I would say no.

Q. On the starboard side?

A. Yes, in the area aft of the pilothouse to the hatchway were definite breaks resulting from a blow.

Q. On the port side you say no, that you don't

(Testimony of Arthur Williams.)

believe that any of it was fractured as a result of a blow, is that right?

A. I said resulting from a blow that planking on the port side was——

Q. I am talking now, though, about these ribs on the port side.

A. Do you mean the ribs we have in question now, that we are talking about now, at the port side of the bilge, were they the direct result from a blow?

Q. That isn't what I said, Mr. Williams. What I want to know is if—I thought it was your testimony that all of [435] the ribs on the port side that showed a fracture were, in your opinion—that fracture was not caused by a blow?

A. That is right.

Q. Is that your testimony? A. Yes.

Q. Upon what do you base that testimony?

A. By observations of the ribs.

Q. What did you observe that led you to believe that? A. Could I have a blackboard?

Q. I will get you a piece of paper. I don't know whether I can get you a blackboard or not.

A. A piece of paper is all right.

The turn of a bilge, this here through here, can be fractured partially into here, or halfway through, maybe the full part of the frame, the entire thickness. It also can be fractured through here, partially. Now, the frames in the bilge on the port side were in that condition. It wasn't a break as if you turned it over your knee and made a break. It was just a fracture. In steam-bending frames, you put it in

(Testimony of Arthur Williams.)

through here, and this very often fractures. However, the frame is not always condemned.

Q. In other words, these fractures you have termed on the turn of the bilge on the port side could have occurred at the bending of the frames, is that correct?

A. Not all of them, because that would not be good [436] practice. However, a few of them.

Q. They could have?

A. Yes, they could have, yes.

Q. And the only reason that you say that all of them couldn't have occurred that way is because you can't conceive of anybody putting a ship together with that kind of material, isn't that right?

A. That's right.

The Court: We will take a short recess at this time.

(A recess was taken.)

Q. (By Mr. Shallenberger): Mr. Williams, there are two kinds of rot, are there not, present in wood in a vessel?

A. Yes; there is dry rot——

Q. And wet rot? A. Yes, wet rot.

Q. Which is present in Exhibit L, dry rot or wet rot?

A. That would be a little of either.

Q. Dry rot is much what its name implies, isn't it, it just sort of dries up, crumbles and pulverizes away? A. Yes.

Q. Wet rot is something that is caused by mois-

(Testimony of Arthur Williams.)

ture over a continued period of time, without a chance to dry out or the sun to hit it, or anything of that sort, is that right?

A. If it dries out it would give the appearance of dry rot. [437]

Q. Now, then, isn't it true, Mr. Williams, that in any boat that is four years old or more, that you will find rot? A. Yes.

Q. And isn't it true that even in a boat that you term to be completely seaworthy that you will find rot? A. Yes.

Q. And isn't it also true, Mr. Williams, that the only way to determine the amount of rot in a vessel such as this vessel, in the place that you have indicated on the port side of the vessel, would be to take all the planking off?

A. No. A vessel could be bored or tapped, if you were looking for dry rot.

Q. If you were looking for wet rot, however, you would have to take the planking off?

A. No, you could find it through the same procedure.

Q. Would that procedure indicate the extent of the rot and the condition of the frames?

A. No. It would just determine whether there was any rotten condition in the vessel in that particular part that you are boring.

Q. But it wouldn't mean that there was rot above or below the particular position where you were boring, would it? A. No.

Q. So, to determine whether it would be nec-

(Testimony of Arthur Williams.)

essary to [438] replace those frames or ribs, it would be necessary to take the planking off, would it not? A. By all means.

Q. All right. Now, then, I show you Respondents' Exhibit A, which you testified with regard to a little while ago, and I believe that you said that this rib over here indicated over-fastening, is that correct? A. Yes.

Q. What do you mean by "over-fastening"?

A. Through here you have a series of holes, and normally the plank would run through here, probably have two or three fastenings in the plank which would run diagonally, here you have five or six, the same thing through here, the same thing through here, also in through here; there seems to be extra large holes through here, which would be the result of driving fastenings over and over again.

Q. In other words, possibly replacement of planks from time to time. A. It could be.

Q. But it doesn't mean that the rib has lost any of its virtue as a rib?

A. In this particular case here you have a broken condition up in here (indicating), you have a very bad condition here, where——

Q. That is on a different rib you are talking about [439] now, isn't it? A. Yes.

Q. You have a split condition on this second rib?

A. Yes.

Q. That could have been caused from over-fastening or a blow, or any number of things, couldn't it?

(Testimony of Arthur Williams.)

A. It could have been in there for years, it is quite possible.

Q. And the fastenings still held O.K., didn't they?

A. Well, on that particular frame I wouldn't say the fastenings were holding very much.

Q. If they don't hold fairly well the vessel would leak, wouldn't it?

A. Not necessarily so, not on one particular frame like that. To have that condition there and cause the vessel to leak, you would have to have it throughout the boat.

Q. In other words, if there was one frame like that, why, the vessel would still be a tight, sound vessel.

A. Yes.

Q. Isn't it true, Mr. Williams, that it is cheaper to put in sister frames at the present price of labor than it is to fill up the fastening holes and use the old ones?

A. If the frame is in good condition, I would certainly recommend plugging the old holes.

Q. But isn't it just as expensive, if not [440] possibly more expensive, to plug those holes than it is to put sister frames in?

A. Oh, no, I don't think so.

Q. Well, do you know what the price of that kind of labor is?

A. The rate that is being charged in yards nowadays, we always estimate it at \$3.50 per hour.

Q. And what length of time would it take for a man to plug up those fastening holes in a rib?

(Testimony of Arthur Williams.)

A. Where it is exposed, it would depend on how much is exposed.

Q. Well, assume that the entire rib is exposed, such as was exposed on the starboard side of the Bear.

A. A couple of men could go through the entire exposed area in a couple of days, very easily.

Q. Do you mean the entire exposed area of the starboard side of the Bear?

A. Where the frames were exposed.

Q. In a couple of days, eight-hour days?

A. Yes.

Q. And how much does it cost for one of these frames, these sister frames, that were put in?

A. The sister frames——

Q. Well, that is all that was put in were sister frames, they didn't make any complete replacement, did they? [441]

A. No; but there was stub frames on one side and seam-bent on the other.

Q. I am only talking about the starboard.

A. I gave an estimate just now, what I would figure would be about \$40 per frame, which would be a liberal estimate, taking everything into consideration.

Q. That includes the cost of the frame, the cost of putting it in, and so forth?

A. That's right.

Q. Now, then, Mr. Williams, did you inspect the main deck beams on the starboard side of the vessel Bear?

A. Yes.

Q. Did you find any of them splintered?

(Testimony of Arthur Williams.)

A. I found three of them splintered.

Q. Where were those beams?

A. Just about abreast of the hatch, right in this section through here, amidships.

Q. Isn't it true, Mr. Williams, that the entire vessel was wracked from stem to stern?

A. From my observation of the vessel, as I stated before, it was after she was up on the ways, and the condition prior to that time I can't answer.

Q. Her condition at the time you saw her, didn't it show a wracking from stem to stern?

A. It showed a jarred condition throughout the vessel, [442] yes, but not a wracking condition. A wracking condition existed around the main hatch.

Q. Well, that was the worst condition of wracking was around the main hatch, but didn't it show a wracked condition throughout the vessel?

A. No.

Q. You say it showed a jarred condition; what do you mean by that?

A. A jarred condition which would show up evidence on your deck where your seams were sprung, and on your hull planking where the seams were sprung, which would loosen the cement that is usually put in on top of the oakum.

Q. Didn't you just testify a few moments ago that it showed a jarred condition throughout the vessel?

A. Throughout the vessel?

Q. Yes.

A. Yes. That I would like to make clear, though, when you say throughout the vessel. I would term

(Testimony of Arthur Williams.)

this part here, through the amidships section, throughout the vessel.

Q. In other words, point out on this model what point you mean as to the jarred condition.

A. A jarred condition——

Mr. Roethke: The court can't see.

The Court: I can see.

The Witness: From amidships of the house to a point on [443] the after side of the bulwarks.

Q. (By Mr. Shallenberger): Aft the bulwark to the stern there was no jarred condition apparent from the decking? A. No, I didn't see any.

Q. Did you look for any?

A. I looked for a jarred condition or a condition here where the seams were sprung. However, when the table was removed the deck was definitely in evidence, a very patchy deck.

Q. What do you mean by that?

A. It had been repaired over a series—a period of time, short splices, short butts in there.

Q. From admidship of the pilothouse forward you didn't observe any jarring? A. No.

Q. Any wracking in the vessel?

A. On the starboard side I observed that the seams were sprung.

Q. How far forward were the seams sprung?

A. I would say about here (indicating).

Q. Indicating from the front of the wheelhouse.

A. Also, I want to state that a portion of this planking was out, which I did not see.

The Court: Indicating a portion amidships.

(Testimony of Arthur Williams.)

The Witness: This section right through here (indicating). [444]

Q. (By Mr. Shallenberger): Now, then, isn't it true that it was necessary to realign the engine and the shaft? A. Yes.

Q. Wasn't that as a result of the collision?

A. May I interrupt there just a moment?

Q. Yes.

A. You said—repeat the question. Maybe I can answer it a little better.

(The question was read by the reporter.)

The Witness: I don't want to answer that question the way I answered it, for the simple reason I was not there when the engine was realigned. However, it would be customary to check the alignment of the engine.

Q. (By Mr. Shallenberger): That is always customary after a collision, isn't it?

A. That is right.

Q. And if it needs realigning, then it is realigned? A. Yes.

Q. I believe when you went over the matter with the court in stating what you did not believe was necessary as a result of this collision you included the engine alignment, didn't you?

A. I wasn't aware of it if I did say it.

The Court: You excluded it. In making your estimate of \$6500 to \$7000 you excluded the alignment of the engine [445] and the shaft.

The Witness: I don't remember doing that. That should have been included.

(Testimony of Arthur Williams.)

The Court: Would your figure be the same?

The Witness: Yes, sir.

Q. (By Mr. Shallenberger): Mr. Williams, isn't it also customary after a collision, when it has been necessary to remove a great deal of the planking and to do the work that was necessary to be done on this boat, that it be repainted?

A. New work should be painted, yes.

Q. Did you include that painting in the item of six thousand some odd dollars that you gave?

A. Yes.

Q. As a matter of fact, about the only items that you left out in reaching your figure were the stub frames on the port side and the calking on the fore-deck and afterdeck, isn't that true? A. No.

Q. What else did you leave out?

A. The entire hull was refastened and recalked, the entire deck was recalked.

Q. I said that you left out the afterdeck and the foredeck. A. The entire hull?

Q. No, no. Of the deck. It was my understanding from [446] what you said that the deck was jarred and opened up from here, just after of the bulwark, to up amidship of the pilothouse, isn't that true?

A. From admidships of the pilothouse it was jarred loose to the after end of the bulwarks, is that right?

Q. I don't know. Was it?

A. That is right, that is the part that was jarred loose.

(Testimony of Arthur Williams.)

Q. All right. It was necessary to recalk that part, wasn't it? A. Yes.

Q. On the starboard side planks were sprung, I believe you said, from the forward end of the wheelhouse on back to the bulwarks, the after bulwarks, is that not true?

A. From the forward end of the wheelhouse here?

Q. I think that is what you said.

A. Yes, to the after end of the bulwarks, that is right.

Q. It was necessary to recalk that part of the hull, wasn't it?

A. That portion of the hull had to be replanked.

Q. It had to be recalked, too, didn't it?

A. It had to be recalked.

Q. You couldn't send it out to sea with just planking on there, no calking, could you? [447]

A. That's right.

Q. Now, then, there were some planks sprung on the port side? A. Yes.

Q. Where were those planks?

A. Right in the turn of the bilge.

Q. How high? A. At the water line.

Q. From the water line which way?

A. On both sides.

Q. All right. From the water line down and the water line up?

A. It took a portion of about four planks in the turn of the bilge.

The Court: May I ask was that at the same

(Testimony of Arthur Williams.)

place that you found the breaks in the frames?

The Witness: Yes, sir.

The Court: Do you attach any significance to the fact that the planking was sprung at the same place that the frames were broken?

The Witness: Yes, sir.

The Court: What significance do you attach to that?

The Witness: I attach—in my opinion the frames along the turn of the bilge on the port side had been broken for some period of time leaving a weakened condition through [448] there.

The Court: And, therefore, because of the break there the planking was sprung?

The Witness: Yes, sir.

The Court: Is it your statement that none of those breaks occurred at the time of the collision?

The Witness: In my opinion the breaks were not caused by the actual hitting of the vessel.

The Court: You say that none of them were caused by hitting of the vessel?

The Witness: I don't think so.

The Court: None of them?

The Witness: No. That is, the actual breaks and the fractures in the frames on the turn of the bilge on the port side.

The Court: Go ahead.

Q. (By Mr. Shallenberger): These planks that were loosened on the port side, it was necessary to paint and recalk those, was it not?

(Testimony of Arthur Williams.)

A. It was necessary to refasten, repaint and recalk, yes.

Q. Didn't it also spring some of the seams on the port side where it wasn't necessary to renew the planking, open up some of the seams?

A. There was evidence of some of the seams being sprung, [449] yes.

Q. Wouldn't it be accepted practice to ream out the calking and recalk those?

A. It would be accepted practice.

Q. Now, then, Mr. Williams, is it your testimony that to recalk the afterdeck, the forward part of the deck, and to put the stub frames on the port side and paint the portion of the vessel where there has been no work that you believe necessary by reason of the collision would come to \$10,000?

A. No.

Q. And yet you say that \$17,700 was a very fair price for the amount of work that Harbor Boat Building Company did?

A. For the repairs on the vessel as I saw it, yes.

Q. Now, then, do you believe that the Bear at the time you saw it on the 17th or 18th of December was in about the same condition as it was on the 30th of November when it was hauled?

A. I am not quite clear on that question.

Mr. Shallenberger: Repeat the question.

(The question was read by the reporter.)

The Witness: I am not in a position to answer that, because I didn't see when it was hauled.

Q. (By Mr. Shallenberger): Well, would the

(Testimony of Arthur Williams.)

fact of hauling it and putting it on the ways change its condition with regard to the damage that you observed on the 17th or [450] 18th of December?

A. In the process of repairing the vessel, and from the time I saw it, a portion of the damage extending through on the starboard side was very much in evidence, a portion of the vessel had been removed, a portion of the planking had been removed that showed, as I have described here, sections in here where the seams were loose, sprung, to make those necessary repairs and observing the port side, finding out what was wrong that they could not refasten because the fastenings would not hold, therefore it was necessary to pull one of the planks, and when one of the planks was pulled it was observed that this broken condition and rotten condition existed through the bilge line, making it necessary to pull another frame; and in order to get good fastening on the planking it was necessary to put in good material to hold the fastening.

The Court: Did you see the boat after the stubs were put in on the port side?

The Witness: Yes, sir.

The Court: Were they fastened securely?

The Witness: They were fastened securely, they were fastened back into the ceiling of the vessel and edge fastened into the old frames.

The Court: I thought you said the stubs were 18 inches to 3 feet in length? [451]

The Witness: Right.

(Testimony of Arthur Williams.)

The Court: If they were not more than 3 feet, what do you mean by ceiling?

The Witness: The ceiling is the inside portion of the vessel.

The Court: Do you mean the board placed on the inside of the frame?

The Witness: That's right.

The Court: Were the stub frames nailed to the old frames that were replaced?

The Witness: They were edge bolted to the old frames.

The Court: What do you mean by that?

The Witness: The other frame rammed along-side and edge bolt through here, wherever they could find a fairly good spot to get a good fastening.

The Court: Were the stub frames in there securely?

The Witness: The stub frames, they were in there fairly securely.

The Court: And securely fastened to the old frames?

The Witness: They were mostly fastened to the ceiling here and the rest on the planking.

The Court: The ceiling one nailed on one side and the planking on the other?

The Witness: Yes.

The Court: I am asking now whether they were fastened [452] to the old ribs in there.

The Witness: They used some fastening through the old ribs, but they didn't get too much success in getting good fastening there.

(Testimony of Arthur Williams.)

The Court: Go ahead.

Q. (By Mr. Shallenberger): Mr. Williams, the figure you gave of six thousand some odd dollars did not include the haul out or the ways charges, did it?

A. Prior to inspection, it would have included the haul out the second time.

Mr. Shallenberger: That is all.

Redirect Examination

By Mr. Callaway:

Q. Mr. Williams, you say in your opinion the break of these frames on the port side were old breaks. Will you state why?

A. Why I thought they were old breaks?

Q. Yes. A. Just from observation.

Q. What observation did you make and what did you see that made you think they were old?

A. By looking at a frame you can usually tell if it is a new break or an old break.

Q. How can you tell? Give us the facts, what you saw. [453]

A. By the dirt and the filth that would be lodged among the members would be one, the discoloration would be another.

Mr. Callaway: That is all.

The Witness: I think this will answer that question much more than I can explain it to you, sir. (Witness showing exhibit.) There is definitely an old break.

(Testimony of Arthur Williams.)

The Court: Referring to Respondents' Exhibit L.

The Witness: Here is definitely an old break through here; this here is caused definitely by rust coming over a period of time working into the timbers, and rust is a very serious thing on any boat.

The Court: At this end here would you say there was an old break there and a new break around the outside?

The Witness: This could be termed as a new break in here, but it is dead wood.

The Court: This interior looks as if it is an entirely different aged break than the break around the outside?

The Witness: That's right.

The Court: Doesn't this look like a new break on the outside?

The Witness: This section here is the new one (indicating); this is the old one; this is a broken timber right here.

The Court: You would say that this interior portion [454] looks like a newer break?

The Witness: This portion here, I would term that as a newer break.

The Court: Than the portion on the outside?

The Witness: Yes.

Mr. Callaway: Your Honor, I think you could break a piece off of that.

The Court: Would you say there was a differ-

(Testimony of Arthur Williams.)

ence in age of breaks from the end here, from the interior portion and the portion on the outside?

The Witness: That would be hard to say here, on that little portion shown here. On these two here, I would say yes, this and this (indicating).

Mr. Callaway: I have nothing further.

The Court: I have a couple of questions.

It was necessary because of the collision, was it not, to insert some of the sister ribs on the starboard side?

The Witness: It was necessary to put a lot of the frames on the starboard side there to hold the new planking that was being put back on. The old ribs that were on there would not hold the fastening.

The Court: Some of them were actually broken, were they not, by the collision?

The Witness: Yes, sir.

The Court: How many ribs on the starboard side would you [455] say were necessary for repair of the vessel?

The Witness: On the starboard side I will have to make that purely a guess, as I say, some of those were removed before I got on the job. I would say 12, maybe 14.

The Court: How many were actually put in?

The Witness: 44.

The Court: Taking into account those matters of repair and renovation which upon cross-examination you admitted to counsel were customary or were usual, or were reasonably necessary, as well as taking into account the items that you listed

(Testimony of Arthur Williams.)

before, namely, the starboard side abreast of the pilothouse, the fact that the deck was jarred loose, the hatch was strained on the port side, some of the planking and the seams were loose, would you want to change your estimate of the reasonable value of doing that work?

The Witness: Only change it to the point that the actual damage that was done from the report that I received from the other party of our office who was in attendance first on the job, I would estimate the job could have been done in a shorter time for the actual damage.

The Court: What I am getting at is you listed certain things and you estimated \$6500 or \$7000, and then on cross-examination you conceded that there were other things that would reasonably be done, that were ordinarily done, that were reasonably necessary, there was various language [456] used; wouldn't that increase the estimate, the cost of the work as you estimated it? Or did you have those all in mind and didn't mention them at the time you gave your original estimate?

The Witness: It is quite possible, I didn't mention several things in there on the repairs in general as I saw it on the vessel. Refastening of the hull, I mentioned that there, it was completely re-fastened. The garboards were taken off.

The Court: That is all. I have no other questions.

Mr. Shallenberger: I have another question or two.

(Testimony of Arthur Williams.)

Recross-Examination

By Mr. Shallenberger:

Q. Were you there before the garboard strakes were taken off? A. Yes, I was.

Q. And it is your opinion that it wasn't necessary to remove the garboard strakes by reason of the collision?

A. I wouldn't have removed them.

Q. You say you wouldn't have removed them. Is there room for doubt as to whether some other competent person might have considered it necessary to remove them?

A. Well, there is room for doubt, yes, there could be room for doubt.

Q. In other words, in your opinion some other surveyor [457] might have considered it necessary to remove them, and you wouldn't say he was wrong, would you?

A. Oh, no. The only thing I would question is as to why they were being removed. However, another surveyor is entitled to that thought, if he thinks there is something wrong there he certainly has the right to ask them to be removed.

Mr. Shallenberger: Nothing further.

The Court: You are excused.

Mr. Callaway: Your Honor, we haven't a prayer of a chance to finish this case today. My direct examination was 15 or 20 minutes, of the last witness. What are we going to do?

The Court: You are a little conservative, coun-

(Testimony of Arthur Williams.)

sel, because the cross-examination was longer. We have to finish this case some time, you know.

Mr. Callaway: I know. I have had my witnesses here every day.

The Court: How many more witnesses do you have?

Mr. Callaway: Eight. I don't think we need to put them all on.

The Court: You have called Borcich and the engineer. Who else was on the bridge of this boat?

Mr. Callaway: Zitko.

The Court: Three of them on the bridge, one in the [458] pilothouse and two on the bridge.

Mr. Callaway: Maybe we can work it this way. I can put on Zitko and Kuljis, the man that was on the bow, and I want to put on one other short witness, and it might be that we could stipulate as to the location of the other men on the boat and as to what their testimony would be. One, two, three of the crew did not see the collision.

The Court: And they are here, are they part of your eight?

Mr. Callaway: Yes.

The Court: What could they help us on?

Mr. Callaway: They know some of the details following. I don't think they are particularly important. Anyway, let's go ahead with this one.

The Court: Let's go on, we will go on to 4:30, and if necessary we will start at 9:00 o'clock in the morning.

(Testimony of Robert T. Petrovich.)

ROBERT T. PETROVICH

called as a witness by and on behalf of respondents, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Callaway:

Q. State your name, please.

A. Robert T. Petrovich.

Q. Keep your voice up. You can talk louder than that. [459] What was your position on the crew?

A. I was cook.

Q. Where were you on November 30th, 1948, when this accident happened?

A. I was in the galley, in the window, leaning leaning over the window in the galley.

Q. On what side? A. Sir?

Q. On what side of the galley?

A. On the starboard side.

Q. Was the Marsha Ann, just before the collision, moving or standing still?

A. The Marsha Ann was standing still.

Q. How long had she been in that position?

A. Practically about four or five minutes, as far as I can recall, I know we was standing still.

Mr. Fall: Will you keep your voice up, please? May I have the answer?

(The answer was read by the reporter.)

Q. (By Mr. Callaway): Here is the Marsha Ann. Where were you?

(Testimony of Robert T. Petrovich.)

A. I was right here (indicating). Here is the galley. Right at the window.

Q. On that side of the boat or the other side?

A. On this side of the boat (indicating). [460]

Q. Then you mean the port side.

He indicated the port side. He said "starboard."

Port side is your left-hand side, and starboard is your right-hand, if you are facing toward the bow of the boat.

A. I was on the left-hand side. Isn't that starboard side?

Q. No. That is port.

The Court: It is a good thing he is your cook.

Q. (By Mr. Callaway): Tell us what you know and what you saw.

A. I saw more than that.

Q. What did you see?

A. A man holler at the bow, he holler, "Back up, back up." At the time he holler "Back up," I got out of the galley and walked up to the bow.

Q. What did you see?

A. I see stern of the Bear like that (indicating), in that position.

The Court: Indicating—what angle is that, 45°?

Mr. Callaway: Just about.

The Court: Indicating the Marsha Ann in contact with the Bear at about a 45-degree angle.

Q. (By Mr. Callaway): Then what?

A. Bear back up and he come back along this side of us (indicating). [461]

The Court: Indicating the Bear moving back

(Testimony of Robert T. Petrovich.)

and around to be alongside of the Marsha Ann, I guess.

Mr. Callaway: Yes.

Q. (By Mr. Callaway): Prior to the time you heard somebody say "Back up," or words to that effect, had there been a collision?

A. I don't know who he was holler, "Back up." I thought he holler to our skipper or the other skipper, I couldn't say that, because I know what man was it that holler, because I can recall his voice.

Q. Who was that? A. Steve Kuljis.

Q. Were you conscious of the two boats coming together? Do you know what I mean by that? Do you know when the two boats hit? A. Yes.

Q. Was that before he said "Back up" or afterwards?

A. He was holler, just about the time they hit.

Q. Before the two boats came together did you hear your vessel giving any whistle signal?

A. Yes, sir, he was whistling right along.

Mr. Callaway: You may cross-examine.

Cross-Examination

By Mr. Roethke:

Q. Mr. Petrovich, you say you were leaning out of the [462] galley window for four or five minutes prior to the——

A. I was leaning out a whole lot before the thing happened.

Q. I see. But did you continue to lean out of

(Testimony of Robert T. Petrovich.)

the galley window for four or five minutes prior to the collision?

A. Not prior to the collision. When the man holler "Back up, back up," and at the same time it hit, I was running to the bow.

Q. Let's go back. At the time you heard the man holler "Back up, back up," what were you doing? A. I was leaning over the window.

Q. All right. How long prior to the time you heard him shout "Back up, back up" had you been leaning out of the window?

A. How long? How long can he holler "Back up, back up"? Three, four times.

Q. Do I understand your testimony to be that you stuck your head out of the window when you heard him holler?

A. I was leaning out of the window before he was hollering.

Q. For how long a period of time had you been leaning out of the window before he hollered "Back up"? A. How long before?

Q. Right. [463]

A. Practically about five or ten minutes, I couldn't recall exactly, but I was leaning over the window, because there was so many whistles coming in and out that I was anxious to see what is going on, because I had to take care of my cooking, also.

Q. For the 10 minutes preceding the collision, or five minutes, you didn't take care of your cooking, you were leaning out of the window?

A. You forget about the cooking.

(Testimony of Robert T. Petrovich.)

Q. You didn't walk out on deck?

A. I certainly did, when he start hollering, "Back up," in the meantime there was crash right there.

Q. Had you gotten out of the galley by the time the Marsha Ann struck the Bear?

A. Marsha Ann didn't struck the Bear; the Bear struck the Marsha Ann.

Q. Had you gotten out of the galley at the time of the impact? A. Repeat, please.

Q. Had you come out on deck from the galley at the time the two vessels hit? A. Yes.

Q. You were out on deck before they came together? A. Yes, sir. [464]

Q. Where did you come, will you show on the model?

A. The door is right there (indicating), right out of here. It only takes a second.

Q. And you started running right to the front of the vessel?

A. Right to the front of the vessel.

Q. Where were you at the exact minute when they came together, can you tell me?

A. Right back of the door there.

Q. How far is it from the door of the galley to the bow of your ship?

A. I don't know the measure of it.

Q. Can you estimate it?

The Court: About half way?

The Witness: It is about half way, yes.

(Testimony of Robert T. Petrovich.)

Q. (By Mr. Roethke): Would it be 40 or 50 feet? A. Just about, yes.

Q. How long is the Marsha Ann, Mr. Petrovich?

A. I really don't know. It is about 100 feet or 104.

Q. You figure you were about 40 feet abaft the stem of the Marsha Ann when you emerged from the galley door? A. Yes, sir.

Q. Were you able to form any estimate of the distance of visibility at the time you emerged from the galley door? [465]

A. I see it when she was right there, at the time she was hit.

Q. When you came out of the galley door you could see the bow of your vessel? A. No.

Q. You couldn't see the bow of your vessel when you came out of the galley door?

A. No, but I see the stern of the Bear.

Q. Could you see the front part of the Marsha Ann at the time you came out of the galley door?

A. Naturally I see it up here.

Q. You could see 40 feet?

A. That is right.

Q. Could you see any beyond 40 feet?

A. Probably a little bit. I see the black Bear because Bear is painted black, and I see the Bear right along as I coming out.

Q. Could you see her down in the water, the water line, or what part of the Bear did you see, Mr. Petrovich?

(Testimony of Robert T. Petrovich.)

A. I didn't look at the water line until he come along the side of it.

Q. In other words, you were merely looking at the superstructure, at the pilothouse, when you came out? A. Yes, sir.

Q. You couldn't see the hull of the Bear at that time? [466]

A. I see the stern of it from this side.

Q. Where was the stern of the Bear?

May we have the two models, Mr. Callaway, please?

Mr. Callaway: Yes, sir.

Q. (By Mr. Roethke): Mr. Petrovich, using these two models, considering the larger of the two to be the Marsha Ann and the smaller of the two to be the Bear, will you place those in the position that they occupied at the time you first saw the Bear after coming out from the galley?

(Witness does as requested.)

The Court: Indicating the Marsha Ann's bow in contact amidships with the Bear at about a 45-degree angle.

Q. (By Mr. Roethke): Mr. Petrovich, did you proceed from the galley door up to the forecastle head of the Marsha Ann? A. Yes.

Mr. Roethke: Indicating he proceeded to the forecastle head of the Marsha Ann.

Q. (By Mr. Roethke): How long did you remain at the forecastle head of the Marsha Ann?

A. Do you mean how long did I stay there?

(Testimony of Robert T. Petrovich.)

Q. Yes.

A. Practically until the Bear backed up and got on the side of him, and we got it secure to pull it in.

Q. How long was that, Mr. Petrovich? [467]

A. I can't recall the time.

Q. Was it a half hour?

A. A good half hour, and then maybe some; I can't tell.

Q. At the time you came out on the fore-castle head of the Marsha Ann, was the Marsha Ann making any headway through the water?

A. No, sir.

Q. How do you know that she wasn't, Mr. Petrovich?

A. It wasn't possible, she was standing still before——

Q. How do you know she was standing still?

A. The engine isn't running, and if I don't hear it in the galley, then nobody can hear it, because that is the noisiest place on the boat.

Q. Do I understand your testimony to be, Mr. Petrovich, that if the engine isn't running the Marsha Ann could have no movement through the water?

A. No, unless she was traveling with the currents.

Q. Well, if they turn off the engine right now, and you are making four or five knots through the water, does that mean that the Marsha Ann is going to come to an immediate stop?

(Testimony of Robert T. Petrovich.)

A. But we were standing still for four or five minutes, anyhow, that I know; maybe more.

Q. How did you determine that you were standing still? [468]

A. How do I determine?

Q. Yes.

A. I wasn't in the galley. I know it was standing still.

Q. I am asking you how did you determine it. Did you have any point of reference to take a sight on to tell that you weren't moving?

A. The engine is standing still.

Q. I appreciate that.

The Court: That is why you think the Marsha Ann was standing still?

The Witness: Yes, I think the Marsha Ann is standing still.

Q. (By Mr. Roethke): Now, after you came up on the forecastle head of the Marsha Ann and saw the vessels in these relative positions, how—

A. I find it in this relative position (indicating).

Q. I didn't mean to rearrange them. How long did they remain in that position, Mr. Petrovich?

A. Not very long. I couldn't tell you exactly the moment or minute, because they started right back backing up and securing the Bear.

Q. Did they remain in that position for a matter of five minutes?

A. Possibly. [469]

Q. Approximately five minutes in that position?

A. Possible.

Q. After they remained in that position four or

(Testimony of Robert T. Petrovich.)

five minutes, what position did they assume in reference to one another?

A. Well, then I noticed the Bear was backing up and coming alongside the Marsha Ann this way, then we secure him and tow him in.

Q. And you figure that it took you maybe a half hour to complete the——

A. I couldn't exactly recall, because I don't never time up anybody what they are doing on board a ship.

Mr. Roethke: I have no further questions of Mr. Petrovich.

Mr. Callaway: Nothing further.

The Court: Let me ask a question.

Did you feel the collision occur?

The Witness : I feel after I got out, yes, actually.

The Court: I don't care where you were, sitting down or standing up, did you feel the two boats come together?

The Witness: Yes, sir.

The Court: What did it feel like.

The Witness: Like sort of a crash-like, like you get hit. Not very heavy, just sort of a smash-like.

The Court: Where were you at that moment?

The Witness: I was out of the galley going towards the [470] bow.

The Court: You were walking at the time?

The Witness: That's right.

The Court: You say you were cooking something down in your galley?

The Witness: Yes.

(Testimony of Robert T. Petrovich.)

The Court: What did you have on your stove?

The Witness: I can't remember now. I really don't.

The Court: When you got back to the galley had anything been spilled off your stove?

The Witness: No.

The Court: Nothing spilled off your stove?

The Witness: No. It wasn't a very big jar.

The Court: Did you have anything on your stove cooking?

The Witness: I have something cooking, but I can't recall, because it was around 11:00 o'clock and I was getting ready for lunch.

The Court: Are you still employed by the Marsha Ann?

The Witness: No, sir.

The Court: Who do you work for now?

The Witness: I work for the Sunshine Meat Company.

The Court: That is all.

Mr. Callaway: That is all.

Mr. Fall: If the court please, the libelants at this time offer in evidence the model of the fishing boat that has [471] been used so extensively in this case for reference as Libelant's next in order in evidence.

The Court: Is there any objection?

Mr. Callaway: Yes, sir, there is an objection.

Mr. Shallenberger: It is stipulated it may go in.

Mr. Roethke: I stipulate it may go in.

Mr. Callaway: There is an objection. I brought

that here with the express understanding that it wouldn't go in evidence.

Mr. Fall: I had one used the same way before Judge Hall——

The Court: And you lost a boat.

Mr. Fall: And he insisted that it go in, it had been used so much, and the record certainly is not clear unless the vessel itself is in evidence.

We will enter into another stipulation, that it may be withdrawn at the termination, upon the finality of the case.

Mr. Callaway: Why not do it this way? I will furnish a photostat of it.

Mr. Roethke: The photographs aren't the same thing.

Mr. Fall: We have referred to the position of lights port side and starboard side, the wheel, and we are in a position where the record itself is in a state of confusion without it being in evidence.

The Court: I think the clerk will take good care of it, [472] and it can be returned to you eventually.

The Clerk: I would suggest that it be put in as a respondent's exhibit, so that it could be returned to Mr. Callaway.

Mr. Fall: Yes, so it could be returned to Mr. Callaway.

The Clerk: Exhibits are returned when the judgment is final, as a matter of course.

Mr. Callaway: This is off the record.

(Discussion had off the record.)

The Court: We have tried to identify it from

time to time, we have referred to the light, or the end of the bulwark, which doesn't fully describe it unless you have got something; but I think a photograph of both sides of it ought to do it, don't you think so counsel?

Mr. Callaway: One starboard and one port.

The Court: I think a photograph of it would take care of it.

Mr. Roethke: I would think so, if the court please.

Mr. Fall: I have no objection.

The Court: Where can you get photographs of it?

Mr. Callaway: I will have somebody make them.

The Court: All right. We will admit the photographs when you have them produced, in lieu of the boat.

Mr. Shallenberger: As long as we are on that subject, I assume, Mr. Callaway, that you intend to introduce those [473] pictures that you have had marked for identification?

Mr. Callaway: There is only one. I will be glad to introduce it right now.

Mr. Shallenberger: Is that the only one that hasn't been introduced?

Mr. Callaway: Yes.

The Court: Received as Respondents' Exhibit K.

(The photograph referred to was marked Respondents' Exhibit K, and was received in evidence.)

Mr. Callaway: Do you want this sketch that he

made in connection with the fracture of the boat?

Mr. Shallenberger: I don't think it is necessary.

The Court: Have you time to call another witness tonight?

Mr. Callaway: I can start one.

The Court: What about 9:00 o'clock tomorrow morning?

Mr. Shallenberger: That is satisfactory with me, your Honor.

Mr. Callaway: It is all right with me.

The Court: Do you think we can get through in an hour and a half? These will be short witnesses, won't they?

Mr. Callaway: Yes. I am going to put on the man on the bow and the other man who was on the bridge. The rest of them I am going to—and I have a very short witness on one other point. [474]

Mr. Shallenberger: We have a very short rebuttal.

The Court: I haven't any doubt that you gentlemen can conclude this case in an hour and a half if you wanted to. Of course, those two witnesses are important from the respondents' standpoint, because they probably were eye-witnesses to the collision. But we have spent a lot of time here, which I will be very frank to say, is not adding too much to the Court's knowledge of this case.

Mr. Shallenberger: I am sorry if I took up too much time on the cross-examination.

The Court: I am not criticizing anybody, but it is one of those things where we estimated a case to run so long, and it has just taken longer to try it.

Mr. Roethke: Your Honor, I didn't estimate this case at two days, I want that clear. I maintained it would take four or five days, because I have tried these cases before.

The Court: Let's lay it onto Mr. Fall. I don't know whether he did it or not, but he is a likely character.

Nine o'clock tomorrow morning.

(Whereupon, at 4:20 o'clock p.m., Wednesday, December 14, 1949, the cause was continued to reconvene at 9:00 a.m., Thursday, December 15, 1949, at which time, due to the death of the Judge's father, the cause was continued to 3:00 p.m., Monday, December 19, 1949.) [475]

Monday, December 19, 1949—3:30 P.M.

Mr. Shallenberger: If the Court please, there are certain witnesses sitting in the courtroom by consent of counsel. It is perfectly all right.

The Court: All right. Call the case.

The Clerk: No. 8960-C Admiralty, Joseph An-cich, and others, v. the Marsha Ann, and others, further trial.

Mr. Callaway: Ready.

Mr. Shallenberger: Ready.

The Court: Proceed.

STEVE KULJIS

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Steve Kuljis.

Direct Examination

By Mr. Callaway:

Q. Were you a member of the crew of the Marsha Ann on November 30, 1948, when there was a collision between that boat and the Bear?

A. Yes, sir.

Q. Where were you stationed on the Marsha Ann just before the accident? [477]

A. I was on the bow, lookout.

Q. How long had you been on the bow?

A. About 15, 20 minutes.

Q. Where did you take your station on the boat, where was the boat?

A. In about midway of Fish Harbor to the lighthouse.

Mr. Roethke: I didn't hear that answer, Mr. Callaway.

(The answer was read by the reporter.)

Q. (By Mr. Callaway): Hold your voice up, Steve, if you can, please, as if you were talking to Mr. Sims back there.

Who stationed you on the bow?

A. Right on the bow.

(Testimony of Steve Kuljis.)

Q. Who told you to go there?

A. Skipper.

Q. What was the condition of the weather?

A. Fog was pretty thick.

Q. Steve, at the time of the accident, was the Marsha Ann moving or standing still?

A. We was standing still.

Q. How long had you been standing still?

A. Approximately about five, six minutes.

Q. How far could you see at that time?

A. Not very far, about 25 feet.

Mr. Shallenberger: About what? [478]

(The answer was read by the reporter.)

Q. (By Mr. Callaway): Where did you first see the Bear?

A. He was about 25 feet away from us.

Q. What part of the boat did you see first?

A. Bow.

Q. Could you see the pilothouse?

A. I saw the bow first, you see, and in a little while after I saw the pilothouse, too.

Q. In what direction was the Bear coming towards you? A. Right at our bow.

Q. What did you do when you saw the Bear?

A. I hollered at the guy, on the skipper, you see, to back up.

Q. Of what boat? A. Of the Bear.

Q. Had you heard anything in the direction from which the Bear came before that?

A. I heard the exhaust of the engine.

(Testimony of Steve Kuljis.)

Q. Did you say anything to——

A. I said to Jack, "This boat isn't very far, because I hear the engine."

Mr. Shallenberger: May I have the answer, please?

(The answer was read by the reporter.)

Q. (By Mr. Callaway): Was any whistle signal being given by your boat? [479]

A. He was blasting now and then, often.

Q. What happened after you sighted the Bear?

A. When I saw the Bear he come right on top of us all at once, it was just in a second.

Q. What direction did the Bear take?

A. To our bow, then he turn hard over on the port side.

Q. Then what happened?

A. Then he hit us about midway his ship and our bow stem.

Q. What happened after that?

A. After that Jack holler at them, "What is the matter? What are you doing? Are you crazy, or what?" And he back up, and then he come alongside, and then we tied the lines up and take him in Fish Harbor.

Q. When Jack said that to him, did he reply?

A. He didn't say nothing.

Q. Was the engine on the Marsha Ann going?

A. No, engine wasn't going at all then. The engine wasn't going at all.

Q. Do you know how fast the Bear was coming when you first sighted her?

A. I couldn't tell you exactly how fast he was

(Testimony of Steve Kuljis.)

coming. He come right on top of us when I see him, right at once, so I don't know how fast he was going. [480]

Q. What did he say to the skipper on the Bear?

A. I hollered at him to back up when I saw the boat right away, you see.

Q. Do you know whether he attempted to do that, or not?

A. Well, he turn hard over on the port side then.

Q. Could you see him do that?

A. Yes, I did see him turn over on the port side, and then he back up after they got hit, then he come alongside of us.

Q. Was anybody else on the bow with you?

A. Not at the time. I was alone on the bow.

Mr. Callaway: That is all.

Cross-Examination

By Mr. Shallenberger:

Q. Mr. Kuljis, how much time was there between the time you first saw the Bear and the collision?

A. That was right now, it was only a little ways from us, so right now, you see.

Q. Probably less than a second?

A. Yes, just a few seconds.

Q. Was it a few seconds——

A. Yes.

Q. ——or just like that?

A. A second or two, just at once. [481]

(Testimony of Steve Kuljis.)

Q. Mr. Kuljis, you said you heard the exhaust of the Bear's engine. A. Yes.

Q. Did you hear it pretty loud?

A. I heard the exhaust going, yes.

Q. It made a pretty loud noise?

A. I heard the exhaust, and then I said to our skipper, "This boat isn't very far away, because I hear his exhaust."

Q. Did it make a loud noise, could you hear it real plain? A. It make noise, yes.

Q. How far did the Bear travel before he turned to the port?

A. When I saw him that was right now, right then, it was a little ways from us, maybe 25 feet.

Q. Did he travel 10 feet before he turned left?

A. Well, maybe something like 10, 15 feet.

Q. Ten, 15 feet, and then he turned left?

A. Turned left, yes.

Q. And you know he turned left because you saw him turn the wheel?

A. Turn the wheel, yes.

Mr. Shallenberger: That is all.

Mr. Callaway: That is all.

The Court: Just a minute. [482]

You say the Marsha Ann was standing still?

The Witness: Yes, sir.

The Court: When you are out on a boat in the water, in the bow of the boat, and you can't see and or you can't see trees or mountains, how can you tell if the boat is moving through the water?

The Witness: I see the sea. I see sea when the

(Testimony of Steve Kuljis.)

boat go through the sea whether it is traveling or not.

The Court: What do you mean you see the sea?

The Witness: Yes.

The Court: What could you see to take a bearing to tell you whether the Bear was traveling or not?

The Witness: I see the boat cut on sea, then I see whether it is traveling.

The Court: You mean making a wake in front?

The Witness: Yes.

The Court: Cutting the sea?

The Witness: Yes.

The Court: It wasn't cutting the sea?

The Witness: No, not at all.

The Court: Standing perfectly *will*?

The Witness: Yes.

The Court: What signal is a boat supposed to sound when it is standing still? There is a different kind of signal when it is standing still?

The Witness: I don't know. I know our skipper was blowing the whistle. I don't know exactly. I couldn't tell [483] you exactly.

The Court: When the boats came together what kind of jolt did it make?

The Witness: It hit.

The Court: Pretty hard?

The Witness: No, not very hard.

The Court: Just easy?

The Witness: Yes.

(Testimony of Steve Kuljis.)

The Court: Were you still in the bow when they came together?

The Witness: Yes, I was on the bow.

The Court: You stayed right there?

The Witness: Yes. I moved a little ways. When the boats come together, hit, I just moved two, three feet.

The Court: What position was the Bear in after the boats came together?

The Witness: He midship and our stem.

The Court: Was the Bear level or tipped to one side, or what?

The Witness: That I could see, he was level. I couldn't see the list on him at all.

The Court: That is all.

Mr. Callaway: I have nothing further.

Mr. Shallenberger: Nothing further.

The Court: Step down. [484]

Mr. Callaway: The witness Zitko who has been here every day is sick today and couldn't come.

May I have a stipulation that there was a seaman named Vincent Beato who was washing down the main deck at the time his attention was called to the incident by the voices of the men, he was not looking in the direction just before the impact, and who would testify, if called, that the Marsha Ann's engines were off and had been for several minutes; that Frank Zankich was down in the hold cleaning the hold and knows nothing of the accident, except that if he was called he would testify that the propeller shaft was in his view and it was not turn-

ing and had not been turning for some little time; that Frank Flando was in the sleeping quarters and knows nothing until he heard some voices outside, but the boat was stopped and had been stopped for several minutes; that Andy Zankich was changing clothes and in his quarters and knows nothing of what happened until after the accident, but that the boat, the Marsha Ann, was stopped, that is, the engines were not running; and that Johnny Morinovich—he has already testified.

Mr. Shallenberger: I don't recall anybody by that name.

Mr. Callaway: Just a minute.

That Johnny Morinovich and Vince Flando were behind the pilothouse helping clean up the deck, and that they saw [485] nothing until their attention was attracted by voices right immediately preceding the collision, and that the Marsha Ann was stopped and had been for some few minutes.

The Court: The boat was stopped or the engines were stopped?

Mr. Callaway: The engines were stopped.

Mr. Shallenberger: If the Court please, as far as the clients that I represent, I can't stipulate to that testimony. Some of it is cumulative, but some of it certainly is not cumulative, except in its effect. I am sorry, but I don't believe in fairness to my clients that I can stipulate to that.

Mr. Callaway: I am not asking you to stipulate to any more than if they were so called they would so testify.

Mr. Shallenberger: I realize that. I can't stipulate.

Mr. Callaway: It is all right, then——

Mr. Shallenberger: I don't know whether I speak for my cohorts or not.

Mr. Callaway: ——I can bring them here.

The Court: Let's read this over again. First of all, let's read this proposal.

Mr. Shallenberger: May I ask this, before the reporter starts? Are these witnesses present?

Mr. Callaway: No. I told them specifically not to come, after my discussion with you fellows Thursday. [486]

Mr. Shallenberger: What discussion?

Mr. Callaway: I announced it before the Court that I was going to bring Zitko and the bowman, that the rest I would ask you for a stipulation as to what their testimony would be.

Mr. Shallenberger: I don't recall that.

Mr. Callaway: That took place in the presence of the Court.

The Court: I don't know what you talked of among yourselves, but I asked where the various men were, and you said Kuljis was in the bow and Zitko was up on the bridge, and they were the only two eye-witnesses, the rest of them were not eye-witnesses. Something was said, but I don't know what you agreed upon about a stipulation.

Mr. Shallenberger: The only thing that I recall was that Mr. Callaway said that we might be able to reach some stipulation as to the balance of the testimony, possibly, after one of them testified.

The Court: Let's hear what he proposes here. Read it, Mr. Reporter.

(Record being read by reporter.)

The Court: Where you say the boat was stopped, you mean the engines were stopped?

Mr. Callaway: That is right.

(The balance of the statement was read by the reporter.) [487]

The Court: Can't we stipulate that these witnesses if they were called they would so testify?

Before you make up your mind, not a single one of these men were eye-witnesses to the collision, and the gist of what they would testify to, when you boil it all down, is that the engines were not running.

Mr. Shallenberger: The only one I couldn't stipulate to—I can't help but say I wish counsel had made clear what he wanted the last day of court, but, anyway, I will stipulate to all of them except the man in the fish hold who said he saw the propeller shaft and it wasn't turning. I can't stipulate to something like that.

The Court: Let's ask this: Supposing the Marsha Ann had its engine cut off but was still traveling through the water, the propeller shaft would not be turning, would it, it would only turn when the engine turned, is that right?

Mr. Callaway: That is correct.

Mr. Shallenberger: That is probably true, your Honor, but it is a question of when did it stop.

That kind of testimony has a direct bearing in

this case with the main contention of the respondents.

Mr. Callaway: All right. I will bring him here. O.K.

Mr. Shallenberger: I can stipulate to the rest of it, but I can't stipulate to that.

Mr. Callaway: You gentlemen all know that up through [488] Thursday I had these men here, you saw them.

The Court: I don't want to club counsel into a stipulation, but it doesn't seem to me that this testimony is any turning point in this case. Any time you stipulate that a witness would so testify, the man whose witness is not personally called has the disadvantage of the Court seeing nobody, just saying somebody would so testify, and you have the disadvantage of not being able to cross-examine him.

Mr. Shallenberger: Right.

The Court: As I see it, the only thing these witnesses would offer that is material at all is that the engines of the Marsha Ann were not running.

Counsel's statement was a little broader than that, he said the boat was stopped; but he modifies that by saying that the engines were stopped.

Mr. Shallenberger: May I suggest this? May I have two minutes with Mr. Fall and Mr. Roethke, and perhaps we can stipulate?

The Court: Sure.

(Slight delay in proceedings.)

Mr. Shallenberger: If the Court please, I have

discussed the matter with Mr. Roethke and Mr. Fall. They are willing to stipulate that prior to the collision these men would testify that the vessel's engine was not running. However, they and myself are unwilling to stipulate to the [489] witness testifying that for a considerable period of time, I believe it was minutes, prior to the collision, that the shaft was not turning.

The Court: Well, the stipulation only said some little time, whatever that means.

I would think you fellows would have jumped at that stipulation. The witness may get on the witness stand and he may testify that it hadn't been running for 10 minutes. "Some little time" doesn't mean,—

Mr. Callaway: No, your Honor. I specified. For instance, this witness Zankich who was in the hold said in cleaning up—this is what I will produce him here to testify to, that they had just unloaded this fish and the hold was dirty from having the fish in it, and that he had taken up whatever covers the propeller to wash it, and that for at least five minutes the propeller—Your Honor, I have been in bed ever since this trial adjourned on Thursday, but it doesn't make any difference, I will bring every one of these witnesses here, and I will be glad to do it, I haven't anything to do but try this lawsuit. They were here and were in attendance every day. I thought that I was giving the opposition all the advantage. I have talked to every one of them personally.

Mr. Roethke: You talked to your witnesses or to me?

Mr. Callaway: Talked to all the witnesses personally. [490]

Mr. Fall: He didn't talk to me about it.

Mr. Callaway: There are certain other details they could add.

The Court: What he has just now stated is not part of the stipulation that he asks.

Mr. Callaway: Let's read it back.

The Court: What you just said or what you said before?

Mr. Callaway: What I said before.

The Court: All right.

(The portion of the record referred to was read by the reporter as follows:)

"The witness Zitko who has been here every day is sick today and couldn't come.

"May I have a stipulation that there was a seaman named Vincent Beato who was washing down the main deck at the time his attention was called to the incident by the voices of the men, he was not looking in the direction just before the impact, and who would testify, if called, that the Marsha Ann's engines were off and had been for several minutes; that Frank Zankich was down in the hold cleaning the hold and knows nothing of the accident, except that if he was called he would testify that the propeller shaft was in his view and it was not turning and had not been turning for some

little time; that Frank Flando was in the [491] sleeping quarters and knows nothing until he heard some voices outside, but the boat was stopped and had been stopped for several minutes; that Andy Zankich was changing clothes and in his quarters and knows nothing of what happened until after the accident, but that the boat, the Marsha Ann, was stopped, that is, the engines were not running; and that Johnny Morinovich—he has already testified.

“Mr. Shallenberger: I don’t recall anybody by that name.

“Mr. Callaway: Just a minute.

“That Johnny Morinovich and Vince Flando were behind the pilothouse helping clean up the deck, and that they saw nothing until their attention was attracted by voices right immediately preceding the collision, and that the Marsha Ann was stopped and had been for some few minutes.

“The Court: The boat was stopped or the engines were stopped?

“Mr. Callaway: The engines were stopped.”

The Court: You had better accept quick.

Mr. Callaway: I have it down here in my notes, when I talked to him, that he puts it, and I put it down that way, he said five or six minutes.

The Court: Are you still willing to stipulate as the [492] reporter read it?

Mr. Callaway: Yes, I will take the stipulation, as it stands, if counsel want to, but I am not going to urge it, that is for sure.

Mr. Roethke: For the record, I dislike being put in the position of creating the impression that we are being dogs in the manger. We are trying a lawsuit, and, sure, we have all had our witnesses here, but we are in the same difficulty, Mr. Callaway, on this other nebulous stipulation. These are facts which go to the essence of the lawsuit.

Mr. Callaway: Then let's forget it.

Mr. Roethke: All right, Mr. Callaway, if that is your attitude, then let's forget it, if you interrupt and don't let us finish our statements.

The Court: Let's not blow up here. I personally don't think it makes a lot of difference, that is one reason why I suggest that you take the stipulation. I don't think whether——

Mr. Roethke: We will accept it.

The Court: It still doesn't answer the question, was the Marsha Ann making headway in the water?

The engines could have been off and the Marsha Ann could have been going full tilt.

Mr. Roethke: That is correct.

The Court: The engines could have been on and she could have gone in reverse. [493]

Mr. Shallenberger: We will accept.

Mr. Fall: I have no objection. I don't think it means one thing, one way or the other, as far as my clients are concerned.

Mr. Shallenberger: We will stipulate to it.

The Court: All right. So stipulated, then.

Mr. Callaway: Mr. Bozanich.

ANTHONY BOZANICH

called as a witness by and on behalf of respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Anthony Bozanich.

Direct Examination

By Mr. Callaway:

Q. What is your business or occupation?

A. I am fleet manager for Pan-Pacific Fisheries of 350 Sardine Street, Terminal Island, California.

Q. Mr. Bozanich, were you so occupied during the sardine season of 1948-49?

A. During the sardine season of 1948 and '49, due to the illness of my brother I temporarily took a leave of absence from my fleet manager's job and went to run the fishing boat Sunset.

Q. How long have you been operating fishing boats in [494] San Pedro waters, Los Angeles Harbor waters?

A. I have been master of my own vessel since 1936; about 13 years.

Q. Do you know whether or not after December 1, 1948, the California Seafood Cannery was taking any sardines?

Mr. Shallenberger: Just a moment. I object to that, your Honor. There is no proper foundation. It is pure hearsay as far as this witness is concerned. This is not the company he says he was employed by.

Mr. Callaway: I will have him explain his answer if you want the basis of his knowledge.

(Testimony of Anthony Bozanich.)

Mr. Shallenberger: No. I am objecting to the question at this time.

The Court: I am going to sustain the objection. It is indefinite and uncertain. He might answer they weren't taking any seafood, and yet the facts might be that they had already agreed to take enough so they weren't taking any more.

Mr. Callaway: I see what the Court means.

Q. (By Mr. Callaway): From December 1st on throughout the remainder of the season, what was the situation with relation to the California Seafoods fleet?

Mr. Fall: If the Court please, again it is incompetent and irrelevant, it is hearsay, there is no proper foundation shown that this man has any connection with or had any [495] knowledge of the operations of the California Seafood Corporation.

Mr. Callaway: Just a minute. I am sorry. I will lay plenty of foundation.

Q. (By Mr. Callaway): Are you familiar with the boats that were fishing for the California Seafoods during that sardine season?

A. I personally knew the skippers of two or three of the vessels that work for that company.

Mr. Fall: If the Court please, "Are you familiar," he has placed himself in the position of testifying from hearsay only.

The Court: We don't know. So far he has just said he knew some skippers.

Mr. Fall: The objection is premature. I think it is.

(Testimony of Anthony Bozanich.)

Q. (By Mr. Callaway): Were those boats fishing during that time for sardines?

Mr. Fall: To which I object, as he has testified that he knows only from hearsay, what other skippers and captains told him.

The Court: We don't know. He said, "Were those boats fishing?" He might know and he might not know.

Do you know, were they fishing?

The Witness: They weren't part of that time.

Mr. Roethke: What boats? [496]

The Witness: The New Washington, the Vashan.

The Court: Who do they belong to?

The Witness: The Vashan belonged to Carl Morinkovich, the New Washington was chartered by Dominic Hubitich.

The Court: Who did they fish for?

The Witness: California Seafood Company, Long Beach.

Q. (By Mr. Callaway): Were they tied up?

A. They were tied up due to the fact that the canneries didn't want any sardines.

Mr. Fall: Just a minute. We ask that the last part of that be stricken on the ground it is a conclusion of this witness. There was no proper foundation that has been laid to permit him to testify.

The Court: The last part may go out; the part that they were tied up may remain in.

Q. (By Mr. Callaway): Do you know what they were canning down at California Seafoods?

(Testimony of Anthony Bozanich.)

Mr. Fall: Again, if the Court please, there is no proper foundation——

The Court: Make your objection.

Mr. Fall: There is no proper foundation to show that this man has any knowledge as to what they were canning at the California Seafoods Company.

The Court: Objection overruled. If you know.

The Witness: They were canning jack mackerel and blue [497] mackerel, and the sardines they were canning were obtained from boats out of port that were not customarily members of the fishing fleet that works out of San Pedro.

Q. (By Mr. Callaway): Do you mean boats from Monterey or the like of that?

A. Monterey and San Francisco.

Q. What was the situation with relation to the fishing fleet of the Pacific Coast during that particular season?

A. During that particular——

Mr. Fall: May I have that question, please?

(The question was read by the reporter.)

Mr. Fall: If the Court please, I think the question is very indefinite.

The Court: Objection sustained on that ground.

Q. (By Mr. Callaway): How many boats were fishing for sardines out of San Pedro during that season?

A. I would say in the neighborhood of 250 boats.

Q. From where?

A. From up and down the whole coast including

(Testimony of Anthony Bozanich.)

the ports of Monterey, San Francisco, Tacoma, Seattle, Everett.

Q. What kind of sardine season did they have?

Mr. Shallenberger: I object to that question, your Honor, as indefinite, immaterial.

Q. (By Mr. Callaway): I will approach it this way, then: How did that season compare in the number of [498] sardines caught with subsequent and prior years?

Mr. Shallenberger: If the Court please, I object to that as not relevant to the issues of this case. In the way it is framed, anyway.

Mr. Callaway: It is preliminary.

The Court: I thought you gentlemen agreed that you weren't going to have to go into the question of the problem of proof of the probable catch; that that would be referred if we got that far in the case. Wasn't that the stipulation?

Mr. Fall: That was the stipulation.

The Court: That is what this evidence is offered for, is it not?

Mr. Callaway: Not primarily.

The Court: What is it offered for, what purpose?

Mr. Callaway: I intend to prove by this witness among other things, that this is not even a sardine fishing boat. It is a salmon boat.

The Court: Why don't you ask him about the boat, then, and get right down to it?

Mr. Fall: We are wasting a lot of time.

Q. (By Mr. Callaway): Are you familiar with

(Testimony of Anthony Bozanich.)

the Bear? A. Yes, I have seen the vessel.

The Court: Have you been on it?

The Witness: No, I have not been on the vessel.

The Court: Where have you seen it? [499]

The Witness: I have seen it tied up in the port of San Pedro, berth 73.

The Court: How many times have you seen it?

The Witness: I have seen it during the past '48-'49 sardine season, I saw it half a dozen times.

The Court: Do you know how long it is?

The Witness: I believe it is in the neighborhood of, I would say, 64, 65 feet.

The Court: How many tons?

The Witness: She should take about 40 tons of sardines in the hatch.

The Court: What is the tonnage of the boat itself?

The Witness: I wouldn't be familiar with the registered tonnage, but I did have a sister ship that was built on the exact model of that boat Bear.

The Court: Built at the same yard?

The Witness: It was built by Babar Brothers in 1920, and I believe the model was the same. The name of this boat was the Mercury.

The Court: Go ahead.

Q. (By Mr. Callaway): What type of fishing was she built for?

A. She is built for salmon fishing in the Puget Sound and Alaska.

Q. Will you state what disadvantages she had

(Testimony of Anthony Bozanich.)

as compared [500] to other purse-seiners that were competing with her during that season?

A. Well, I noticed, the first thing about it, all the salmon boats, none of them have a crow's nest or lookout on top of the mast.

Q. What is the importance of that?

A. The importance of that is on a dark night when we are scouting around for fish, the boats that work out of San Pedro with the use of the lookout in the crow's-nest are able to spot the fish at a further distance much sooner than an observer would be able to do the same from the bridge of a vessel similar to the Bear.

Q. What other disadvantages does she have?

A. The other disadvantages, she is a smaller type boat with a smaller capacity for carrying fish. She cannot use as long or as deep nets, as big a net as we generally carry aboard our vessels. She is equipped with rope purse lines, whereas the majority of the fleet in our harbor have wire rope or cable purse lines, which enables us to set our net in four or five fathoms of water, providing the bottom is clean, whereas a purse-seine with rope for purse line has to set in at least 14 or 15 fathoms of water.

Q. In other words, if you spot fish in shallower water the Bear wouldn't be able to make a set for them, whereas these other boats would, is that it? [501]

A. He would be able to make a set, but they would get tangled up in pursing up his net, whereas a boat with a wire purse line, the net would become

(Testimony of Anthony Bozanich.)

clear and he would be able to lift it up without any damage and catch the fish at the same time.

Mr. Shallenberger: If the court please, this all goes to the element of damage.

The Court: That all goes to the element of damage.

Mr. Callaway: I can't bring this out on a reference, if one is necessary.

The Court: Why not? It may be a little more informal, but the purpose will be to take testimony.

Mr. Shallenberger: Yes, to go into every fact to determine that thing.

Q. (By Mr. Callaway): By the way, do you know what condition the Bear was in? What did you observe about her condition?

Mr. Fall: As to what time?

Q. (By Mr. Callaway): Right before this accident, in November, 1948.

Mr. Fall: Did he see her just before the accident in 1948? When did he last see her?

Mr. Callaway: He said he did.

The Witness: I saw the boat a half dozen times during the October dark of 1948. [502]

Mr. Callaway: You claim she was in the shipyards all the rest of the time.

The Court: Describe her condition as you saw it.

Q. (By Mr. Callaway): As you could observe it.

A. What I observed about the vessel was the lack of a crow's-nest, and she wasn't equipped such as the vessels that we have in this harbor, due to

(Testimony of Anthony Bozanich.)

the lack of cable purse lines, and the net was not quite as big, in my estimation, as the nets that we carry here in this harbor.

Q. Did you observe anything about her physical characteristics other than that?

A. She is an older type vessel, and the equipment aboard her wasn't probably, as kept up as we have on the newer type vessels in the harbor.

The Court: Did you see that?

The Witness: I did notice that, yes.

The Court: What equipment did you notice?

The Witness: Like the winches, for example, they have small niggerheads for pursing, whereas we have larger niggerheads for pursing here, where we purse our nets much faster, and with less wear and tear on our gear than the boats do on the salmon fishing. In salmon fishing they use a lighter gear than what we have in our sardine net.

Q. (By Mr. Callaway): Did you pay any attention to the fact of whether or not the boat was hogged, or not? [503]

A. To tell you the truth I wasn't aboard the vessel myself and I saw her from the wharf. I didn't go aboard the vessel.

Q. Mr. Bozanich, taking these two boat models here, in your experience as a navigator if a boat traveling at any speed through the water, for example, two and a half knots, turns sharply, will she go sideways any distance?

A. Yes, she would for a little distance, she would

(Testimony of Anthony Bozanich.)

go sideways in the water and her stern would have a tendency to swing in that direction (indicating).

Mr. Callaway: That is all.

The Court: Mr. Bozanich, supposing a boat was traveling two and a half knots per hour, and it was suddenly turned sharp to port, as much as it could be turned, how many seconds would it take before the stern of the boat began to respond to the helm?

The Witness: It depends a lot on your steering conditions.

The Court: You said you knew the Bear. Let's take the Bear.

The Witness: I would say in about three or four seconds.

The Court: That it would begin to respond?

The Witness: Yes.

The Court: After it began to respond, with what speed would the stern swing around? [504]

The Witness: As the wheel turned, the steering wheel, it would increase the speed at which the stern would swing around. In other words, until you put her to hard over it would take three or four seconds or five, until you have it hard over. When she is completely hard over she would swing a lot more than when she is just part of the way.

The Court: Do I understand it would take four or five seconds for it to respond at all, and then take four or five seconds more until it was hard over?

The Witness: Yes, I believe it would.

The Court: It would take——

(Testimony of Anthony Bozanich.)

The Witness: It would take seven or eight seconds until she was hard over and responded.

The Court: That is all.

Mr. Shallenberger: If the court please, I have no questions other than as pertaining to damages, and in view of our stipulation I don't know why I should take the time of the court to cross-examine this witness on that.

The Court: I don't either. You had a stipulation on that.

Mr. Shallenberger: I have no questions, then.

The Court: Step down.

(Witness excused.) [505]

ARTHUR DeFEVER

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Callaway:

Q. Give us your full name.

The Witness: Arthur DeFever.

Q. What is your business or occupation?

A. Naval architect and marine surveyor.

Q. How long have you been so engaged?

A. Engaged with Hudson, Green, Haldeman as naval architect from '42 to '47 and associated with Capt. Wilvers from 1947 until the present day.

(Testimony of Arthur DeFever.)

Q. Did you have occasion to attend aboard the Bear on the 30th of November, 1948?

A. I believe it was the 31st of November; if I can refer to my notes I can tell.

Q. It wouldn't be the 31st, it would either be the 30th or the 1st of the next month.

A. It must have been the 30th.

Q. Where was she at that time?

A. On the dry dock, Harbor Boat Building Company.

Q. Did you thereafter continue to observe the Bear?

A. That's right.

Q. What did you observe about her? [506]

A. I noticed that she had damage on the starboard side amidships to the extent of bending and twisting——

Mr. Shallenberger: Pardon me. May I inquire what Mr. DeFever is reading from?

Mr. Callaway: Tell him what it is.

The Witness: These are my original notes that I had made up at the time I attended aboard.

Mr. Shallenberger: May I inquire, Mr. DeFever, if you are using those to refresh your memory, or if it is necessary for you to read those?

The Witness: Well, to refresh my memory, principally. It has been a year since the accident occurred.

Mr. Shallenberger: In other words, upon looking at those your memory comes back of what you actually saw at the time you were there?

(Testimony of Arthur DeFever.)

The Witness: That is right. I probably don't need them. If you would rather I not use them——

The Court: Are they all notes made at that time?

The Witness: Yes, these notes were made up at that time.

The Court: Including the sketches?

The Witness: Well, this was during the course of repairs, and upon the completion there.

Mr. Shallenberger: These notes that you are referring to, Mr. DeFever, those were all notes made by you? [507]

The Witness: Yes.

Mr. Shallenberger: Not by Mr. Williams or someone else?

The Witness: These notes I am referring to were made by myself.

Mr. Shallenberger: If you refer to any other notes made by someone else, will you please tell me if you do?

The Witness: That's right.

Q. (By Mr. Callaway): What did you observe?

A. She had damage on the starboard side just aft adjacent to the rigging. The planks in that area immediately below the guard were damaged, and two planks on the port side were loosened at the seams. The knees in the hold showed signs of movement, and from the extent of the damage in that area I assumed that some of the frames might be broken, but not being open sufficiently I couldn't definitely determine that on that day. The rail cap

(Testimony of Arthur DeFever.)

was broken in that area. The waterway plank or covering board, it is called, was crushed, and some of the deck seams in that immediate area were loosened.

Q. Did you continue to observe her?

A. After that date, yes.

Q. Would you tell us if the boat was at a later time opened up? A. Yes, it was.

Q. What did you observe then? [508]

A. We noticed in the area of the collision some of the frames were stove in, and also as the vessel was opened on the port side the frames were in bad condition.

Q. Did you form a conclusion as to whether or not the frames on the port side that you have mentioned were damaged as a result of the collision in question? A. They were definitely not.

Q. And what do you base that on?

A. Well, the cracks were very evident that they were of long standing or been broken for quite some time. It was proven by the fact that there was foreign matter in the cracks and well adhered to the broken surfaces.

Q. Did you follow the vessel while she was being repaired?

A. I did a good part of the time.

Q. Will you tell us from your examination what repairs were made necessary by reason of this collision?

A. I would say the necessary repairs would have been to replace approximately 6 to 8 frames on the

(Testimony of Arthur DeFever.)

starboard side in the way of the collision, the broken planks in that immediate area, which would average 14, 16 or 18 feet in length; to repair the rail, replace——

The Court: The guard rail, do you mean?

The Witness: The guard rail and the bulwark rail. And also replace a section of the covering board, recalk the deck [509] in this immediate area, recalk the loosened planks on the port side, repair slight damages to the rigging, check and re-align the alignment of the engine shafting. Then there is the matter of cleaning up the hold when the vessel first went on dry dock, due to the remaining fish and scale and foreign matter left in the hold which needed to be cleaned up for working conditions, and then paint the vessel in the damaged areas.

Q. What actually was done in addition to what you have mentioned?

A. Well, there was considerable refastening of all the planks, recalking, removing some of the sheathing on the outside of the planking in the stern, work on the seine table, stiffening of the engine beds, painting the superstructure and topsides of the vessel.

That covers it pretty well.

Mr. Shallenberger: May I have the answer read?

(The answer was read by the reporter.)

The Witness: Also, there was fore and aft garboards removed and replaced.

Q. (By Mr. Callaway): What are garboards?

(Testimony of Arthur DeFever.)

A. They are the first plank adjacent to the keel.

Q. In addition to the work that you first mentioned, this additional work, it is your judgment that that was not occasioned by the accident? [510]

A. That is my judgment, yes.

Q. How much did you determine that it would cost to do the amount of work that you found to be due to the collision?

A. In my opinion about \$5900.

Q. By the way, what condition did you find the boat in after she was opened up?

A. Very bad condition.

Q. In what particulars?

A. Pretty well rotten all the way through. The fastenings were well eaten away, very little value to many of them left, as far as strength is concerned. That was the general condition throughout.

Q. What about the boat being hogged?

A. Yes, there is a hog evident on the afterdeck.

The Court: Being hogged?

Mr. Callaway: Yes. I will have him explain it.

The Witness: The decking is in very poor condition, being composed of many short sections, the walking seams are fairly well chewed up, showing recalking many times.

Q. (By Mr. Callaway): What does hog mean?

A. The hogging of a vessel is when the bow and stern, you might say, sag away from the midships and shows tension on the deck, and reverse to her sheer, it lessens the sheer of the vessel and in many cases shows a hump in the deck. [511]

(Testimony of Arthur DeFever.)

Q. Do you have an opinion as to where the accident had anything to do with that?

A. No, I would say not.

Q. A vessel in that condition, would you consider her seaworthy? A. No.

Q. Why not?

A. In my opinion after the vessel was opened up and viewing her decks, heavy weather could cause the boat to work tremendously, break off some of the small fragments of the fastenings remaining and she would take on water in heavy seas.

Q. Is it your opinion that this additional work that was done on the boat in connection with her fastenings and those other things you mentioned should have been performed whether this accident happened or not?

A. Yes, they definitely should have been.

Q. Was this boat, while it was in the Harbor Boat Works, worked on constantly during every working day, or was it sporadic, or what was the situation?

A. Well, I wouldn't say to the full extent—the amount of men or crew on the boat fluctuated quite a bit, and I wouldn't say that it was really worked on constantly and really pressed the best effort to get her out in a reasonable length of time. [512]

Q. What is your opinion as to the reasonable length of time it should have taken to make the repairs that you found due to the collision?

A. I would say 20 to 25 calendar days.

Q. How often were you there, Mr. DeFever?

(Testimony of Arthur DeFever.)

A. I couldn't give a definite report on that. I was there very constant at the beginning of the job, and then turned it over to one of our employees, Mr. Williams, to keep closer contact with it as I had another job in the yard and I wanted to make sure the job was followed through properly. But when my time was available, I would drop by and make an inspection on it. When problems did arise Williams would call our attention to it.

Mr. Callaway: You may cross-examine.

Mr. Shallenberger: If the court please, at this time I wonder if I might go call my office to find out if we have settled the case that comes before your Honor tomorrow. San Francisco was to wire me this afternoon. I called just before court convened and no wire had come in. I would like to call now before my office force goes home. If a wire has come, then we need not clutter up your Honor's calendar.

The Court: Yes, you may go out.

(A slight delay in proceedings.)

Mr. Shallenberger: No luck, that is, no word.

Mr. Callaway: Now, gentlemen, let's get this straight. [513] May I have a stipulation that I may take this model vessel and substitute two photographs, one showing each side of the vessel?

Mr. Roethke: It is all right with me.

Mr. Shallenberger: That is O. K. with me.

Mr. Fall: I think that was the order of the court several days ago.

(Testimony of Arthur DeFever.)

The Court: He was to do it the other way around; he was to submit the photographs and then get the vessel. I didn't know how he intended to do it.

Now, you may have the vessel and you will thereafter substitute the photographs.

Mr. Callaway: Yes.

The Clerk: Shall I assign a number to them at this time?

The Court: Yes.

The Clerk: They will be Respondents' Exhibits—will they be photographs, two of them?

Mr. Callaway: Yes.

The Clerk: Exhibit O-1 and O-2.

(The Respondents' Exhibit numbers O-1 and O-2 were reserved for the two photographs.)

Mr. Shallenberger: Do I understand these documents are to be offered in evidence? I will offer them as [514] Libelants' and Interveners' next in order.

The Clerk: Libelants' Exhibits 14-A and 14-B.

Mr. Shallenberger: Do you have all those exhibits marked Libelants'?

The Clerk: Yes. I believe it was stipulated at the beginning of the trial that it was agreeable.

Mr. Shallenberger: May we have a stipulation now that they may run both to Libelants' and Interveners' case?

Mr. Callaway: So stipulated.

Mr. Roethke: So stipulated.

The Court: All right.

(Testimony of Arthur DeFever.)

Cross-Examination

By Mr. Shallenberger:

Q. Mr. DeFever, between the 30th of November and 17th of December, how often were you aboard the Bear?

A. I couldn't say exactly the number of times.

Q. Do you have anything in your notes that would help your memory?

A. Well, I don't know. No, not on the number of times. I wouldn't be able to say. I would say it was frequent.

Q. By "frequent" do you mean once a week or twice a week?

A. I would say I was there probably every day or twice a day for two or three days at a time, and then I might miss a day or two, depending on the amount of work done by the [515] yard. If they weren't working on it or didn't have many men, there was no use attending on board.

Q. Well, would you say you were there a dozen times during that 17 days?

A. I just couldn't say. I don't remember. It is too long ago.

Q. Would you say you were there 10 times?

A. I said I couldn't tell you.

Q. Were you there three times?

A. It was more than three times, I know that.

Q. December 17 is when Mr. Williams took over, is it not?

A. Yes.

Q. After Mr. Williams took over how many times would you say you were there?

(Testimony of Arthur DeFever.)

A. That couldn't be stated exactly. I wouldn't want to say.

Q. Once a month?

A. No; it was more frequent than that.

Q. Twice?

A. No; more frequent than that, because I had another job in the yard——

Q. 10 times a month?

Mr. Callaway: Let him finish.

A. (Continuing): I had another job in the yard and I [516] would pay a brief visit to the vessel or keep in touch with Mr. Wililams during that time.

Q. (By Mr. Shallenberger): Do you know when the vessel was finished?

A. From my notes here, why, the vessel was finished about February 17th.

Q. Between December 17th and February 17th were you there at brief intervals?

A. That's right.

Q. Now, then, that first 17 days when you made these visits, how long would you be there?

A. A sufficient time to observe the amount of work going on.

Q. How long was that?

A. Well, that would vary each day, also.

Q. From what to what, in length of time?

A. It could be three or four hours at a time, it could be just 10 or 15 minutes.

Q. How many times would you say you were there three or four hours at a time?

A. I wouldn't say they were too frequent.

(Testimony of Arthur DeFever.)

Q. Would you say half a dozen times?

A. Well, during those three or four times it wouldn't be exactly right on the vessel, it might be on another job right in the yard, and then back to it again. [517]

Q. Did you ever see Mr. Sims aboard the vessel?

A. Yes, I have.

Q. Did you usually see him when you were there?

A. Occasionally. In the yard, at least. I wouldn't say that I saw him on the vessel, but in the yard.

Q. Now, then, you stated after December 17th that you made brief visits to the vessel and——

A. The vessel was completed on or about—let me refer to my dates. You may go ahead.

Q. After December 17th, you say you made brief visits to the vessel and usually you would come to the vessel if Mr. Williams would ask you to come when some problem arose, is that correct?

A. Yes, or if he had some question in mind.

Q. What problems arose, Mr. DeFever?

A. No problems other than that he would want me to take a look at it, to discuss it with him as to frames, planking, calking, amount of damage caused.

Q. How many times did he request you to come and discuss these frames and calking and damage?

A. I don't recall. It wasn't very frequent, as far as him actually calling me.

Q. Then there weren't any problems except that you were—he was an employee of your firm and you would shoot a little breeze about it once in a while, is that right? [518]

(Testimony of Arthur DeFever.)

A. That is right.

Q. You never made any objection to the yard as to what they were doing, did you?

A. No, I don't recall making any objections to the yard. We had no power to supervise the construction. We were merely observing the amount of work done.

Q. In other words, you were asked to observe the work, and that is all?

A. We were representing the underwriters, and we had no power to authorize work to be done on somebody else's vessel. They had their own representative there.

Q. Did you ever make any suggestion to the yard that something wasn't necessary or that it was necessary?

A. I myself didn't, no.

Q. Did you ever tell your underwriters before the vessel was completed that there was being too much work done there?

A. I believe they were aware of it, yes.

Q. Did you tell them?

A. Our office advised them of it, I would say.

Q. How do you know that?

The Court: The question is did you tell them?

The Witness: I believe I could say yes on that, sometime during the time of construction, yes.

The Court: Who did you tell? [519]

The Witness: Mr. Platisha.

Q. (By Mr. Shallenberger): When did you tell him?

A. I couldn't say the exact date.

(Testimony of Arthur DeFever.)

Q. Approximately, with relation to the beginning of the work and the end of the work?

A. I couldn't say. That is too long ago.

Q. It could have been right at the end?

A. No, I wouldn't say so.

Q. The middle?

A. If you want me to guess at it——

Q. No. I don't want you to guess at it. Tell me if you know.

A. It would be reasonably after the vessel was opened up.

Q. What did you tell him?

A. That there was a considerable amount of work being done on the vessel, more than arising out of the collision.

Q. Did you tell him what work that consisted of?

A. That couldn't be stated at the time for the reason that it wasn't all done at one time. It was done right up to the completion of the vessel, and any work like that we were unconcerned about, anyway.

Q. In other words, Mr. Platisha just had you go over there because he likes you?

A. We were concerned about the damage in the immediate [520] area of the collision. What the owner wants to do, paint the superstructure or the mast, or lengthen the boat, we are not concerned. We are there to attend aboard to examine the immediate area of the accident, and no other work.

Q. And to examine on behalf of your clients anything that might be necessary to be repaired by reason of the accident, is that not right?

(Testimony of Arthur DeFever.)

A. Yes, caused by the accident.

Q. And if there is a lot of work going on that you deem is not caused by the accident, you observe that, too, don't you? A. In a casual way.

Q. So that you can come into court and testify in a law suit that it wasn't necessary, is that right?

A. To a certain extent, yes.

Q. Isn't that part of your job?

A. To a certain extent.

Q. Then you observed it in more than a casual way, the difference between these two sets of workings, did you not?

A. I wouldn't say on all of it, no.

Q. All right, Mr. DeFever. If you didn't observe it in a precise and detailed manner, and carefully, how did you know it wasn't caused by the collision?

A. Well, it was evident prior to that work being done, [521] the vessel was examined for the amount of damage done by the collision.

Q. How long did it take you to examine the vessel the first time you examined it, Mr. DeFever?

A. It would say periodically the better part of the first day she was hauled, I was there the second day after they had the hold cleaned out, and kept fairly close to it thereafter until they got the work well in hand.

Q. Had you ever seen the vessel prior to the time you saw her in the ways on the 30th of November?

A. No, I couldn't say that I had.

Q. You don't know what her condition was prior to that time?

(Testimony of Arthur DeFever.)

A. Not prior to being on the ways, no.

Q. You didn't see her at the Van Camp dock when she first came in?

A. No, I didn't.

Q. She was on the ways when you first saw her?

A. That's right.

Q. Now, Mr. DeFever, you say she was hogged. Isn't it true, Mr. DeFever, that a new vessel just completed being constructed and off the ways can be hogged?

A. She can be hogged, but she is designed to a certain extent to take that amount of hog immediately after launching.

Q. And aren't there, also, many vessels that ply the [522] seas for years and years and years that have a decided hog? A. There is.

Q. And they pass insurance surveys, don't they?

A. I would say some of them do.

Q. Now, then, in stating what the repairs were that you believed necessary to be done from the collision, you stated that there were 6 to 8 frames on the starboard side that were stove in. I assume you mean broken? A. Yes.

Q. And that there were broken planks on the starboard side, and in arriving at the number of those how did you arrive at that?

A. By the concave in the hull in that immediate area of the collision.

Q. How did you arrive at how many there were?

A. Just by that, the concave. The hull has fairness to it, and you can see the damage in that immediate area when she is stove in.

(Testimony of Arthur DeFever.)

Q. But you say 6 to 8 frames, I mean that is your recollection of it as you saw it last November 30th, 1948, is that right?

A. And a few days thereafter, yes.

Q. You didn't get it from your notes?

A. That is right.

Q. It is just your recollection? [523]

A. That's right.

Q. In fact, most of what you are testifying to today is a matter of your recollection, isn't it; it is not in your notes?

A. I would say it is a fact——

Q. I mean it is mostly recollection, isn't it?

A. ——what I stated here occurred or is the truth.

Q. You didn't answer me, Mr. DeFever. It is not in your notes, it is in your mind?

A. That's right.

Q. Mr. DeFever, as to what is necessary to repair a vessel that has been damaged in a collision of this sort, many things are a matter of opinion, are they not, Mr. DeFever? A. That's right.

Q. And while your opinion might be that certain things should not be repaired, another competent marine surveyor, a man of the same calibre as yourself, might have a different opinion, is that not right.

A. That could be.

Q. So if a competent marine surveyor said, "I believe that this planking should be removed and refastened, because I think it was loosened sufficiently by the collision to do so," and you said, "No,

(Testimony of Arthur DeFever.)

I don't believe so, I believe that was loose before," you wouldn't say that either one of you [524] were right or wrong absolutely, would you?

A. Well, it is a personal opinion, a matter of opinion.

Q. Mr. DeFever, you are very familiar with the Harbor Boat Building Company, aren't you?

A. Yes, I am.

Q. In and out of their yards a great deal of the time? A. Yes.

Q. You have jobs in there frequently?

A. Well, at times. It is spotty.

Q. Would you say that the Harbor Boat Building Company does good work?

A. As far as their work is concerned, I would say it was good work as an average.

Q. Would you say that they are efficient in their work?

A. Well, I decline to answer that.

Q. Would you say that they are not efficient?

A. Well, I would say that would vary, too.

Q. How would that vary?

A. Well, some jobs they may be, and others they may not be. Through the number of jobs we have had there, we have seen it exist.

Q. Would you say that condition exists in their boat yard any more than it does in any other boat yard in the harbor area the size of the Harbor Boat Building Company? [525]

A. I would say it does.

Q. What? A. Exists.

(Testimony of Arthur DeFever.)

Q. More in the Harbor Boat Building Company?

A. Yes, I think I would have to say that.

Q. In other words, if a person just had their boat wrecked and chose a yard at random, you think they would do better to choose some other yard than Harbor Boat?

A. That is up to the individual.

Q. No. I am asking you the question.

A. At times. It depends on the situation. As I say, we have had jobs in there that have been all right; others haven't been too satisfactory.

The Court: You send work to the Harbor Boat Company?

The Witness: To be very frank with you, we haven't recently.

The Court: You have in the past?

The Witness: I don't think that I could say I have sent a job there.

Q. (By Mr. Shallenberger): How about your organization? A. In the past they have.

The Court: How recently?

The Witness: I don't think there has been one gone there directly from our office for the last nine months or a year or so, and even then I don't know about that. [526]

The Court: Not since they finished rebuilding the Bear, is that it?

The Witness: I know we haven't sent one, so it is more than a year.

Q. (By Mr. Shallenberger): Now, then, Mr. DeFever, I believe you stated that you had another job in there at the time. What was that?

(Testimony of Arthur DeFever.)

A. That was for the Department of the Interior,
U. S. Wild Life Service.

Q. They picked the boat yard, and not you?

A. That job went out on bid.

Mr. Shallenberger: That is all.

Redirect Examination

By Mr. Callaway:

Q. The situation is about like this, Mr. DeFever, if they have a job in there and there is a penalty that they get it done and done right, they do it, otherwise you take your chances?

A. That is the general experience we have had.

Mr. Callaway: That is all.

The Court: Just a question or two.

You gave an opinion as to these necessary repairs, did you not?

The Witness: That's right.

The Court: What would be the necessary cost of taking [527] off the planking on the starboard side? Just that item alone.

The Witness: The amount of planking arising out of the accident, is that what you are referring to?

The Court: Yes.

The Witness: We term "planking" removing and replacing, in the vicinity of 5½ a lineal foot.

The Court: 5½ dollars?

The Witness: Yes.

The Court: What would be the cost for replacing the frames on the starboard side per frame?

(Testimony of Arthur DeFever.)

The Witness: They would run in the vicinity of \$40 apiece.

The Court: In addition to the cost of taking off the planking?

The Witness: That's right.

The Court: That includes labor and material?

The Witness: That's right.

The Court: What about stub frames on the port side, is that the same price?

The Witness: You are speaking of frames now?

The Court: Putting in stub frames.

The Witness: They would be of a different value, because they were sawed frames on the port side and steam bent frames on the starboard side. [528]

The Court: On the port side you would take them and saw them according to size?

The Witness: Yes.

The Court: What would they run a frame?

The Witness: I didn't make any estimate of that because I wasn't concerned, not arising out of the accident.

The Court: You know generally what it costs to put a stub frame in, do you not?

The Witness: I would say those frames would probably run in the vicinity of \$25 apiece.

The Court: For labor and material?

The Witness: That is for the frame itself. There isn't much material involved. It is a frame section. It isn't really a stub frame. It is a frame section.

The Court: What do you mean it is a frame section?

(Testimony of Arthur DeFever.)

The Witness: It is a section of a frame fastened in place to make a sister frame in that area.

The Court: Does that figure that you gave just include the making of the stub frame and the fastening in the boat?

The Witness: That is right. It doesn't include removing the planking or installing it to install the frames.

The Court: Did you find any evidence that the deck of this boat had been shoved out of true?

The Witness: Just in the immediate area of the covering board the seams were loosened. The covering board was crushed [529] only and not broken clean through, and that is a pretty good guard against protection of your decking.

The Court: What do you mean by the covering board?

The Witness: It is a wide member which is the outer member around and adjacent to the stanchions or rail. It is usually a member which is wider than the decking itself.

The Court: That is all.

Mr. Callaway: That is all.

Mr. Shallenberger: Nothing further.

Mr. Callaway: I may have just one question of the witness here, your Honor.

That is all.

Mr. Shallenberger: I have two witnesses in rebuttal, your Honor. They shouldn't take long. Mr. Filosevich, take the stand.

NICK MILOSEVICH

called as a witness on behalf of the intervening libelants, having been previously sworn, was examined and testified, in rebuttal, as follows:

The Clerk: Your name is Nick Milosevich?

The Witness: Yes, sir.

Direct Examination

By Mr. Shallenberger:

Q. Mr. Milosevich, you have been sworn before in this [530] trial and testified? A. I did.

Q. You testified you were at the wheel of the vessel during this collision? A. Yes.

Q. Mr. Milosevich, do you recall what kind of a foghorn was on this vessel?

A. We have a foghorn on that vessel that they use for them big trucks, long one, I don't know how you call them, a big long one.

Q. How old was that horn, do you know?

A. Just we bought it maybe a month before that, just a new one.

Q. How loud a sound did it make?

A. A big sound, make like a big—you know when train goes, this Daylight train, it is the same thing like that.

Q. Does it make a whistle like those modern diesel Daylight trains?

A. Yes, same thing, same type of whistle.

Q. Was that the type of sound it was making at the time of the collision? A. Yes.

(Testimony of Nick Milosevich.)

Q. And do you know how much air pressure was being used to operate that horn?

A. You can use from 5 pounds up to 60. More pressure [531] she sounds better. We was using about 60 pounds all the time.

Q. Was that true at the time of the collision?

A. Yes.

Q. Now, then, Mr. Milosevich, was the engine aboard the Bear a loud-sounding engine?

A. No.

Q. Why?

A. Because we have silencer on it, muffler.

Q. When you were at the wheel of the vessel could you hear the engine exhaust?

A. Hard to hear it; just a little bit.

Q. Now, Mr. Milosevich, if you are going 6 or 7 knots an hour—Withdraw that.

When the Marsha Ann towed you in after the collision, do you know in which direction she went?

A. After collision, you mean?

Q. Yes, when she towed you in.

A. We was going straight for San Pedro lighthouse.

Q. All right. Mr. Milosevich, here is the entrance to the breakwater (indicating); will you indicate where you and the Marsha Ann were, to the best of your recollection, and the direction in which you went?

A. When she hit us we was about $2\frac{1}{2}$ mile to his lighthouse; the direction we was going, west

(Testimony of Nick Milosevich.)

northwest and a [532] quarter north, about 295 degrees.

Q. Were you being towed in that general direction when you were towed in by the Marsha Ann?

A. Yes, because he heard the whistle, too, afterwards, you know, so he took us right in. It takes us from this place to the cannery over an hour, an hour and 15 minutes, to get there. He was towing us, of course, slow.

Q. Now, then, Mr. Milosevich, about how long did it take him to get from where the collision was to the light, abreast of the light?

A. I should judge by his power he can make it easily in 15 minutes.

Q. What did he do? That is what I mean. How long did it take him?

A. It takes us over half hour to get there from collision.

Q. Did you form any estimate as to how fast he was towing you?

A. I should judge about 3, 4 mile an hour. I wouldn't say any more than that, because on account of the boat they take no chances. They can do faster if they want to, but they tow us that fast.

Q. To the best of your recollection it was about 3 or 4 miles an hour?

A. Yes. [533]

Q. Not any more than that?

A. No.

Mr. Shallenberger: That is all.

(Testimony of Nick Milosevich.)

Cross-Examination

By Mr. Callaway:

Q. Mr. Milosevich, which were you using, this air whistle that you had, or were you using this foghorn, as you say they have on the trucks?

A. I use foghorn, what they use on the trucks, these big trucks using it now.

Q. I thought you said on direct examination that you were blowing an air whistle, of which you gave us the dimensions.

A. That is the air whistle, of course.

Q. In other words, are both things you are talking about the same? A. Yes.

Q. They are not two separate whistles or signals? A. No; one single whistle it was.

Mr. Callaway: That is all.

Mr. Shallenberger: Nothing further. Mr. [534] Sims.

LOUIS SIMS

called as a witness on behalf of the intervening libelants, having been previously sworn, was examined and testified, in rebuttal, as follows:

The Clerk: Your name is Louis Sims?

The Witness: That is correct.

Direct Examination

By Mr. Shallenberger:

Q. Mr. Sims, when you did the work supervising

(Testimony of Louis Sims.)

the repairs of the Bear, by whom were you employed?

A. The underwriters of the Bear.

Q. Were you employed in any way by Mr. Korgan or Mr. Bilas? A. No, sir.

Q. Did Mr. Korgan or Mr. Bilas direct you to do anything with repairs to the Bear?

A. No, they did not.

Q. Did any representative of theirs direct you what to repair and what to do?

A. Well, there was one time during the course of the repairs that they took exception to one method that I was using.

Q. What was that?

A. In regard to the repair to the main clamp.

Q. All right. What did they want or say? [535]

Mr. Callaway: I object to that as being hearsay.

Mr. Shallenberger: This man is testifying as an expert as to what he did and didn't do, and who ordered him to do it. I believe that should be permissible.

Mr. Callaway: The conversation he had with the libelants in this case outside of the presence of the respondents?

The Court: Objection sustained.

Q. (By Mr. Shallenberger): Did you at any time during the ordering of the repair of this vessel follow the orders of the owners or their agents?

A. I did not.

Q. Did you do anything or order anything with regard to the repair of this vessel that you did not believe to be a result of the collision?

(Testimony of Louis Sims.)

A. I did not.

Q. Now, then, Mr. Sims, in your opinion why was it necessary to recalk almost the entire vessel as a result of the damage due to the collision?

A. Well, as I told you before, she had sustained a heavy damage. Her calking was slack and started and it was necessary to recalk it.

Q. Were there areas in the vessel that were recalked which had not been subject to damage, direct damage?

A. There were a few areas forward, at the forward end of the vessel, forward end of the seams, and also a few, [536] a very few, at the after end. However, the calking of the seams amidships, in carrying them to that extent forward and aft, it was necessary to carry them through to their end.

Q. Why?

A. Simply because if you don't, if you calk only part of a seam, your new calking has a tendency to open that seam where the calking stops, where the original calking remains it tends to open the seam, the seam will leak.

Q. Mr. Sims, I show you Respondents' Exhibit 7 and ask you to examine that. It appears to be a picture of the starboard side of the Bear, and I ask you to examine it with regard to the guard rail, and particularly with regard to a marking that appears on part of the length of the guard rail; do you know what that marking is?

A. Well, yes; it is probably more evident in one of the other photographs. However, that is where

(Testimony of Louis Sims.)

the steel facing had been removed from the guard, from the outer section of the guard.

Q. By the steel facing, you mean the steel strip that runs out as the outer layer of the guard rail?

A. That is correct.

Q. In this picture the guard rail exhibits it with that removed, is that correct?

A. That's right.

Q. Now, then, showing you Respondents' Exhibit A, [537] Mr. Sims, which appears to be one side of the ship showing certain sister frames and some stanchions, calling your attention to the broken area here in what I assume would be the ceiling of the ship, I believe you were shown this picture by Mr. Callaway and he has asked you if certain parts were broken and certain parts were rotten, is there any difference between that ceiling wood and the planking outside? A. Yes, there is.

Q. Will you state that difference?

A. The hull planking and also the main deck planking is a selected vertical grain wood. The vertical grain is used because of the fact that it bears up well under service, and also for the additional strength of the vertical grain. It is selected, it is a live wood, green wood, and in cases where it is possible, where the shipyards have it in stock, it is air-dried. The ceiling wood is not a wood that is subjected to the same use, so consequently it isn't, of necessity, the same quality.

Q. In that connection is it more apt to rot?

(Testimony of Louis Sims.)

A. Well, of course the thing is there the fact that it isn't the same quality, it is a lower quality wood, and quite often there is a lumber run in that has come from logs that has probably been down in the woods, or maybe a dead tree that has maybe been lumbered and sent through the mill. Any time dead lumber is used, it is much more subject [538] to a rot condition, which is entirely different in its character than the rot normally found in ship material.

Q. What is the purpose of the ceiling wood at this particular position in the vessel?

A. The purpose there is just to seal the inside of the fish hold for the ease of cleaning, to keep the filth and the dirt from the fish cargo that is put in there from getting down into the frames, so that when the fish are unloaded it is readily cleaned out.

Q. The knees on the port side of this vessel, I believe you testified some of them were broken by reason of the collision, is that correct?

A. No, they weren't broken, they were strained. Well, the knees on both the port and starboard side were strained, and I believe I specified in my report that they were opened on the toes and the foot of the knees on the starboard side and opened at the knee of the port side for $\frac{3}{8}$ of an inch.

Q. Well, it was the stub frames, then, on the port side that were broken, is that right?

A. Well, the original frames. The frames on the port side were broken on a line with the lower end

(Testimony of Louis Sims.)

of the knee. That is at a position where the planks were kicked out on the port side.

Q. In your opinion, Mr. Sims, were those stub frames broken by the collision, or were they broken before the [539] collision?

Mr. Callaway: I object to that as having been asked and answered. It has all been gone into.

The Court: I will overrule your objection. I think it was asked and answered of your expert. I want to know what Mr. Sims has to say about it.

The Witness: It is my opinion that they were broken as a result of the accident.

Q. (By Mr. Shallenberger): I show you Respondents' Exhibit L, Mr. Sims, which purports to be a portion of one of the frames from the vessel Bear, and ask you if that is in the same condition as the frames you saw upon the Bear before their removal?

A. In the same condition except for the fact that it has been out of service for practically a year, and during that time it has thoroughly dried out.

Q. What difference would that make in the piece of wood?

A. After a piece of wood has been wet for any length of time and absorbed moisture, and then again you dry it out, you have the condition that you have here; you have a dry, brittle feeling, and a tendency to dust, powder.

Q. Examining the end of this rib to the left of the direction that the writing goes on the exhibit

(Testimony of Louis Sims.)

card, can you tell me whether there is any rot there or not? [540]

A. No. That is sound wood.

Q. How about this part in here (indicating), indicating the left side.

A. As far as I can see it is sound wood.

Q. Is that rot? A. No, definitely not.

Q. What makes the difference in the coloration there?

A. Well, these brown spots here on the one side are where the fastenings—it is just as though we break out these places in here where the nails have been pulled, and this here is a section of a new break.

Q. Is there any rot anywhere on that timber? If so, will you point it out?

A. Not that I can see. That looks sound enough.

Q. Now, showing you Respondents' Exhibit M, which purports to be a piece of planking from the bear, would you examine that? A. All right.

Q. Do you find any rot on that piece of planking?

Mr. Callaway: That wasn't introduced for the purpose of showing rot. That was introduced for the purpose of showing the condition of the fastenings.

Q. (By Mr. Shallenberger): What would you say with regard to the condition of the fastenings?

A. Those particular fastenings right there have been [541] in service for some time. The cross-sectional area, the end of the nail has deteriorated

(Testimony of Louis Sims.)

and rusted. As far as that being an example of the general fastenings of the planks that were removed from that vessel, that is not a true example. You can see that from the frame, the section of the frame that we were just looking at.

The Court: I note these nails or fastenings shown in Exhibit M are square. Are they still using square nails?

The Witness: Yes.

The Court: So that wouldn't indicate any age of the nail?

The Witness: No, sir.

Q. (By Mr. Shallenberger): Were the fastenings throughout the Bear in better condition or worse condition than these examples?

Mr. Callaway: He just got through answering that.

A. They were in better condition.

The Court: The objection is overruled.

Mr. Shallenberger: I wasn't sure whether he had or not, Mr. Callaway. We haven't got a jury, so I don't think the judge is any more impressed.

Mr. Callaway: I was thinking of the time, Mr. Shallenberger.

Q. (By Mr. Shallenberger): Showing you Respondents' Exhibit N, which purports to be a portion of the frames taken from amidships on the port side, will you examine those? [542]

A. Is it all right to try to stick a knife in it?

Q. Sure. What would you say with regard to the condition of those?

(Testimony of Louis Sims.)

A. I would say that has a degree of wet rot in it. However, the frame is not completely collapsed. It still has strength in it.

Q. Would it still be serviceable for any considerable period of time?

A. Well, if it wasn't disturbed it probably would be.

Q. Is this piece representative of the frame, generally, of the frame taken from admidships on the port side of the Bear?

A. When you say "representative" do you mean an average of 50 per cent? There were frames there, yes, but as far as them being the case rather than the exception, no.

Q. In other words, frames of this sort were in the minority, is that correct?

A. That is correct, that is absolutely correct. And another thing, the frames that were in that condition were not on the same plane, they were not on the same line.

Mr. Shallenberger: That is all.

Cross-Examination

By Mr. Callaway:

Q. Looking at Respondents' Exhibit B, would you say the frames there, the old ones, were at all representative [543] of the frames in that vessel?

A. No.

Q. In other words, you just opened it up and you just happened to find them like that in that one spot?

A. I didn't find those there at all.

(Testimony of Louis Sims.)

Q. What do you mean?

A. That is not my photograph.

Q. Isn't that representative of what you saw?

A. No, that isn't. That is representative of that particular frame, that's right.

Q. In other words, they were just this way in this one spot, but when you went on down you found them to be in better shape than this, is that right?

A. There were none of the frames that were not serviceable.

Q. Does a frame have to collapse before it ceases to be serviceable, Mr. Sims?

A. No. When a frame is broken it is not serviceable.

Q. Assume it is not broken, does it have to collapse? Doesn't a vessel like this get considerable stress and strain in bad weather on the sea?

A. Occasionally they do, yes.

Q. Don't they do it when it is stormy?

A. That's right.

Mr. Callaway: That is all. [544]

Mr. Shallenberger: That is all, Mr. Sims.

That is all, your Honor.

The Court: Is that all?

Mr. Callaway: Yes.

The Court: Do you want to argue this a little bit?

Mr. Callaway: What I would prefer to do, if your Honor please—the doctor really told me not to come down at all today, but I was anxious to

complete this. We have already submitted most of our law except on one point. I think we might file some very short arguments in the form of briefs so the court could have them and study them. Also, due to the lateness of the hour.

The Court: You want me to be honest with you, don't you, counsel?

Mr. Callaway: Certainly.

The Court: I don't know whether briefs on the factual part of it would make much difference. We have one point of law I am not quite satisfied about. On the factual side of this, I don't know whether briefs would help or not. After all, you sit here and listen for four or five days. However, I don't want to cut you off.

Mr. Shallenberger: I don't want to send Mr. Callaway to the hospital, but I am perfectly willing to argue it.

Mr. Fall: What point of law did your Honor have in mind that he still was not satisfied on? The question of [545] whether or not a member of the crew had a cause of action and who should represent him?

The Court: Yes, that is a point of law.

Mr. Fall: I think that has been answered very, very briefly. The question of explaining that to the court is this: It is the contention of counsel that there is no cause of action. Well, I think we have shown there is, that a cause of action does exist.

Who is to institute or proceed and prosecute that cause of action? The contention of the respondent

in this case has established that, that the seaman must, for the reason that it cannot be placed upon the owners of the vessel upon which he is employed to determine an ultimate question of law as to who must be sued. That is the answer.

Here they contend, "Well, no, we are not liable, you should have sued the owner."

The Court: Wait, counsel. You very glibly tell me that this is done very customarily, it is common practice in admiralty, and so forth, and I am still looking for a case that is on all fours on that proposition.

We have some cases that squint at it. We have the Van Camp case. This is my first quarrel with admiralty, but it has been interesting. I have been reading cases at night, and I have been looking through Benedict on Admiralty. I don't want to keep counsel here if he doesn't— [546]

Mr. Callaway: If it wouldn't help the court any——

The Court: My mind isn't made up on this matter, on certain phases of it, possibly. I take it the things I have to decide are these: We have the libels filed here by the seamen and the interveners, the owners. I suppose the first question we have got to find out is whether there was any negligence on the part of the Marsha Ann. Is that right?

Mr. Callaway: Sure.

The Court: Then in view of your stipulation, and also because of the nature of the case, I suppose I have to find whether there is any negligence on the part of the Bear. In other words, it is one

of those strange cases where both boats were apparently standing still, if I listen to some of the witnesses.

Mr. Shallenberger: The more admiralty cases your Honor tries the less strange that will become.

The Court: At any rate, those two things have to be decided. Then if there is negligence on the part of the *Marsha Ann*, regardless of whether or not there is negligence on the part of the *Bear*, I have to find out what the damage was. Is that right?

Mr. Callaway: That's right.

The Court: Then I have to determine if there is negligence on the part of the *Marsha Ann*, and then regardless of any negligence on the part of the *Bear* I have to determine [547] whether the fishermen have a right to recover.

Mr. Callaway: That is right.

The Court: And if they do have the right to recover we would refer to a referee the amount.

Mr. Callaway: That is right.

The Court: That is what I have to decide.

Mr. Shallenberger: Whether we argue this or not, I want to give this to the court. It is a case which we ran across during the trial of the case. You can switch names and with very few minor details have the same factual situation that we have here. It is the case of *Grenadier v. The August Korff*, 74 Fed. 974. It is an old case, but it is still very good law, and the facts are practically on all fours with this case.

The Court: I will permit you to file briefs on it if you will do it promptly.

Mr. Callaway: All right.

Mr. Shallenberger: If we are going to file briefs, could you do what judges many times do? I always appreciate it. I am sure that your Honor probably did when he was practicing. Could you indicate what your Honor is interested in hearing something about?

The Court: Well, that is the point. If I start to tell you what I think about it I will wind up by deciding the case. [548]

Mr. Callaway: I am not planning, as far as I am concerned—I am trying to limit the opposition—on filing a long-winded re-dissection of the evidence.

The Court: Supposing I decide part of the case right now, then go on from there and see where we are. There will still be some things to be decided when I get through telling you what I am thinking about.

I was not concerned about the stipulation you gentlemen entered today, because I believed the witnesses when they said that the motors, the engines of the Marsha Ann was not going at the time of the collision. I came to that conclusion. Other witnesses to that effect didn't add or detract.

I think that the motors of the Marsha Ann were not turning at the time of the collision. However, I think the Marsha Ann at the time of the collision was sliding through the water fast enough to constitute negligence on the part of the Marsha Ann,

together with all the other circumstances of the case.

I am prepared to find negligence on the part of the Marsha Ann.

That leaves open the question of negligence on the part of the Bear, which, frankly, I have not resolved that question in my mind.

I understand that this is not a case where contributory negligence bars recovery, but if there was negligence on the [549] part of the Bear, then there is a mutual fault situation.

I reached my conclusion as to the Marsha Ann on a number of things. Some of them you may not agree with. I do not know whether I would even put them in findings, or not. But in trying to find out where the truth lies, sometimes it is rather difficult.

First of all, you have got a situation where the Marsha Ann had come up the coast without any fog, gone into the harbor and discharged her fish. She had then started to proceed out of the harbor, and the first fog was encountered before she got to the light within the harbor.

On the other hand, the Bear had hit fog earlier, had hit fog off of Seal Beach, probably, and had been fighting its way through the fog for some time before the collision.

I have driven an automobile in fog, and so have you, and I know it is a matter of common experience when you hit fog, and the fog begins to get heavier, your first tendency is to bowl on through it, and the farther you get into the fog the more difficult it becomes to drive, and you wind up creep-

ing in the fog. There is nothing in the record, probably, on that particular point, but my conclusion is that the Marsha Ann, having hit the fog for the first time inside the harbor, the fog began to thicken up, probably by the time she got to the light it began to get heavier, the Marsha Ann's tendency [550] was to cut her speed as she proceeded, but she had for the first time come in contact with the fog.

The Bear, on the other hand, had been fighting it, had a number of its men up on top where they watched the thing.

That is one conclusion.

Secondly, I am led to the conclusion by the fact that the Marsha Ann had radar, one of these new-fangled inventions that are supposed to prevent accidents. The Bear did not. The Bear had to rely on the old-style method of knowing where you were and trying to protect yourself.

I am impressed by the witness who said that as the Bear proceeded along it tried to answer whistle for whistle. That is, if it heard a whistle out here some distance that gave a sort of a long toot, it answered with the same kind of a whistle, indicating that it heard that fellow. If someone over here pulled a short one, the Bear answered with a short one.

It was feeling its way through the fog, relying on nothing but what seamen had to rely upon from the earliest days of the sea, just their senses, sound and sight.

The Marsha Ann, on the other hand, picked up

this boat on radar, picked up the boat which turned out to be the Bear. There is evidence that the engineer told the skipper that the boat was following an erratic course, and they lost it within the 200-yard section of radar where you can't see what is [551] going on. Well, I cannot escape the conclusion that, having had the benefit of radar, having picked up a boat which was coming toward it, off its port, I guess it was, off the port side, and then having lost it within the 200-yard range, meaning that the boat was close, the safe thing might have been for the Marsha Ann to have reversed her motors, come to a complete stop, and given the signal indicating she was standing still, until this boat got out of the way. Apparently that was never done. At least there is no evidence that the Marsha Ann ever reversed her motors and brought the boat to a complete stop. There is conflicting evidence. There is testimony that she shut her motors off, would slide along, and then start them again and stop. Then there was evidence that she was standing still, which I am not inclined to credit.

That was further borne out today when one of the witnesses said that he told the skipper that that boat was pretty close, because he could hear its motor.

Thirdly, I reached the conclusion for the reason that I am convinced the boats came together with more of an impact than some of the witnesses have indicated. Certainly they both weren't standing still.

I am convinced that the damage that was done,

even to an old boat, even to a boat on which there were probably timbers that were not as they should have been, was not the damage which would have occurred had the helm been ported [552] and the rear of the stern of the Bear started to swing around and come into collision with what the respondents claim was practically a standing boat. Boats do not respond that rapidly.

The witnesses for the respondents themselves, none of them said it was more than 25 feet away when they first saw it. A witness today fixed 25 feet and fixed a second or two from the time he saw the boat until the time of the collision. He said he saw them port the helm.

In 25 feet and the few seconds that were involved, the helmsman couldn't have ported his helm and caused his stern to swing around and hit the Marsha Ann with force enough to go clear in through practically 12 inches of the guard rail and the band that surrounded it.

Also, I have in mind the fact of the way the boats came together. The force of the blow on the Marsha Ann was taken right on the nose, a 3 by 3 iron band down the front, a good solid piece, with the planking coming in and joining the section in the front. A boat could probably take a stronger blow in stride in that section than it could probably anywhere else.

On the other hand, the Bear, having been hit amidships, was not in position to stand that kind of a blow. It explains to some extent the reason for the relatively small amount of damage on the

Marsha Ann and the greater amount of [553] damage on the Bear.

I will be glad to have you in your briefs point out to me whether or not, number one, the Bear was guilty of contributing—do you call it contributory negligence in admiralty?

Mr. Shallenberger: No. Whether it is one of the proximate causes.

The Court: All right. Number two, briefly, what the amount of damage could be.

I am bothered about this damage situation. Here is a boat, the Bear I am speaking about, which obviously is not a new, up-to-date boat; however, it is operating, it is being fished, and a collision occurs and it suffers considerable damage. It might have continued to operate for several years had the collision not occurred. On the other hand, it might have gotten out in a storm and a good heavy sea might have ripped some of it apart. I am interested in the question of damage.

And then, finally, which is a point of law, in addition to stating to me that the seamen are entitled to recover, I would like to have you spell out a theory for me, at least. If you can't cite a case to me, spell out a theory on which you would give a seaman a recovery.

O.K.?

Mr. Callaway: All right. [554]

The Court: On the matter of briefs, how much time do you want? I think you had better take the burden on proving the——

Mr. Callaway: This is the 19th. I will have mine before January 1st. Is that too long?

The Court: That is all right. How much time do you want, on the 10th?

Mr. Shallenberger: That will be satisfactory.

The Court: Do you want five days to reply?

Mr. Callaway: Five, or I will tell the Court I don't want to make a reply, one or the other. If I don't think it is important, I won't make one.

Mr. Roethke: January 1st is a Sunday, January 2nd is a holiday. I am just thinking out loud here.

The Court: You said the first of January. By that do you mean the end of the month, the 31st of December?

Mr. Callaway: I assumed the Court wasn't going to work on it over the holidays, anyway.

The Court: Some of these gentlemen have a case here tomorrow.

Mr. Callaway: I will try to get it in on the 31st. If I can't, I will have it in on the 3rd.

The Court: If you prefer, we will fix some date in January.

Mr. Shallenberger: If the Court please, let's make it [555] the 3rd and 13th, because if he gets it in on the 31st, I am very sure I am not going to work on it until the 3rd.

The Court: All right. We will give him January 6th, which is the end of the week, that is Friday; and we will give you gentlemen until the 16th.

Mr. Shallenberger: That is satisfactory.

The Court: And then Mr. Callaway will either

file a reply brief by the 20th or will not file one.

Mr. Callaway: Or I will give you a letter telling you I do not intend to file one.

The Court: Thank you for your assistance and your courtesy in this case, gentlemen. I enjoyed trying it. We are not through with it yet.

Mr. Roethke: Thank you.

Mr. Shallenberger: We have enjoyed trying it.

The Court: It will stand submitted with the filing of the briefs. [556]

LIBELANT'S EXHIBIT No. 14-A

Invoice

Harbor Boat Building Co.
Builders of Fine Craft
Terminal Island, California
(Los Angeles Harbor)

Date: February 16, 1949

Sold to Boat "Bear" and Owners

c/o Mr. Sam Bilas

922 W. 19th Street, San Pedro, Calif.

and Mr. George Koran

955 W. 8th Street, San Pedro, Calif.

and Mr. John Breskovich

Tacoma, Washington

Job No. 6942

Inv. No. 4658

Provide services of men and pumps necessary to keep vessel afloat at dock prior to drydocking.

Drydock vessel.

Clean underwater body free and clear of all marine growth, and coat with one coat of approved bottom paint.

Remove to approved butts 14 courses of hull planking and bulwark planking on the starboard side inclusive of the sheer strake in the way of damaged area. Renew planking as original. Remove to approved butts starboard side main guard in way of damaged area and renew as original. Fabricate and install 46 bent oak sister frames starboard side of hull in way of damage. Remove an approximate 16-foot section of starboard side covering board in way of damaged area and renew as original. Main clamp on starboard side, where broken, to be cut out and suitable filler blocks installed. Hanging knees in way of damaged clamp to be removed, Douglas fir backing piece bolted through original clamp and over damaged area, original knees to be notched and refitted to vessel. Two main deck beams in way of damaged area to be repaired and/or renewed as found necessary. Remove and replace as original approximately 50 lineal feet of ceiling wood on the starboard side to facilitate repairs.

Remove to approved butts 8 strakes port side hull planking along and above the turn of the bilge, and renew as original. Supply and fit 44 oak stub frames (sawed) amidships on port side where original frames broken out. Release and jack back to original position 3 hanging knees on both port and starboard sides. Remove approximately 14 feet of both fore and aft ends of port and starboard gar-

board strakes where sprung and renew as original.

Fabricate, fit and install Douglas fir engine stiffeners on outside of hull and through-bolt from engine foundations, both port and starboard.

Reef out entire hull caulking and recaulk, re-cement and/or re-putty as original.

Entire original hull planking to be refastened.

Reef out and recaulk entire aft main deck. Remove all turntable blocks to allow for recaulking of main deck, and replace same upon completion of caulking. Main deck planking to be pitched as before.

Jack back main deck and hatch coaming and all sprung structure to original position. Refasten hatch coaming and butt ends of all after main deck planking.

Mainmast chain plates on starboard side of bulwarks to be restored as original.

Main engine and shafting alignment to be checked and realigned as found necessary. Main engine to be given dock trial upon completion of repairs.

Agreed price: \$17,770.67. (2½% sales tax on material included).

Cleaning and painting of bottom, in the amount of \$269.00, included in agreed price.

Copies to: P. Banning Young, Attn. Mr. Sims

801 North Fries Avenue

Wilmington, California

Wilvers & De Fever, Attn. Mr. Williams

1225½ South Leland St.

San Pedro, California

Mr. Colin Davies
624B S. Pacific Coast Highway
Redondo Beach, California

Seen, noted and approved without prejudice.
Subject to adjustment. P. Banning Young, Engineer and Marine Surveyor.

/s/ L. O. SIMS.

2/28/49

Received in evidence Dec. 19, 1949.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 28th day of November A.D., 1950.

/s/ SAMUEL GOLDSTEIN,

/s/ S. J. TRAINOR,

Official Reporter.

[Endorsed]: No. 12761. United States Court of Appeals for the Ninth Circuit. Jack Borcich, Andrew Vilicich and Bortul Zankich, Co-Owners of the Oil Screw Marsha Ann, Appellants, vs. Joseph Ancich, John Kaiza, Anton Bogdanovich, Peter Svorinich, Martin Miskulian, Ray Zukowski, William T. Decker, George Korgan, Sam Bilas, W. H. Hoopes, Nick Milosevich, George Korgan and Sam Bilas, Appellees. Apostles on Appeal. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 5, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12761

JACK BORCICH, ANDREW VILICICH and
BORTUL ZANKICH, Co-Owners of the OIL
SCREW "MARSHA ANN,"

Appellants,

vs.

W. H. HOOPES, NICK MILOSEVICH, GEORGE
KORGAN, JOSEPH ANCICH, JOHN KAI-
ZA, ANTON BOGDANOVICH, PETER
SVORINICH, MARTIN MISKULIAN, RAY
ZUKOWSKI and WILLIAM T. BECKER,

Appellees.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD FOR CONSIDERATION
THEREOF

I.

Jack Borcich, Andrew Vilicich and Bortul Zankich, Co-Owners of the Oil Screw "Marsha Ann," appellants, hereby adopt the Assignment of Errors filed with the Clerk of the United States District Court, Southern District of California, in the above-entitled action as their Statement of Points on which they intend to rely on this appeal.

II.

For consideration of the above-mentioned points, the appellants hereby designate the entire record as certified and transmitted by the Clerk of the United

States District Court, Southern District of California, in the above-entitled action.

Dated at Los Angeles, California, the 6th day of December, 1950.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 8, 1950.



No. 12761

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BORCICH, ANDREW VILICICH and BORTUL
ZANKICH, Co-Owners of the Oil Screw MARSHA ANN,
Appellants,

vs.

JOSEPH ANCICH, JOHN KAIZA, ANTON BOGDANOVICH,
PETER SVORINICH, MARTIN MISKULIAN, RAY ZUKOW-
SKI, WILLIAM T. DECKER, GEORGE KORGAN, SAM
BILAS, W. H. HOOPES, NICK MILOSEVICH, GEORGE
KORGAN and SAM BILAS,

Appellees.

APPELLANTS' OPENING BRIEF.

TRIPP & CALLAWAY,
935 Van Nuys Building,
Los Angeles 14, California,
Attorneys for Appellants.

TOPICAL INDEX

	PAGE
Statement of jurisdiction.....	1
Statement of the case.....	3
Version of the appellees.....	3
Version of appellants.....	3
Summary of testimony of appellees.....	4
Summary of testimony of appellants.....	9
Specifications of assigned errors relied upon by appellant.....	13
Summary of argument.....	14
Argument	17

I.

The Court erred when it found: "Sixth: (2) That at the time of the said collison and for more than an hour preceding the same the Bear was sounding fog signals in compliance with the applicable rules of the road. Ninth: (2) That the Bear was manned by a competent crew. Ninth: (3) That the Bear was well and carefully navigated"..... 17

II.

The District Court erred when it found: "Sixth: (1) That at the time of the said collision the Bear was proceeding at a speed of about 1 to 1½ miles per hour. (7) That at the time of the said collision the Bear was virtually dead in the water. Eleventh: (3) That the Bear was not traveling at an excessive speed under all the circumstances"..... 23

III.

The court erred when it found: "Ninth: (4) That the Bear was maintaining a proper and efficient lookout. Eleventh: (7) That the position of the lookout on the Bear on the open bridge was reasonable and proper under all the circumstances of the case. (8) That the position of the Bear's

lookout did not contribute to the collision; that it would have happened regardless of where the lookout was stationed" 26

IV.

The trial court erred when it found: "Eleventh: (6) That under the circumstances of this case, Article 19 of the International Rules does not apply" 31

V.

The court erred when it found: "Eleventh: (4) That the Bear was stopping her engines and navigating with caution. Sixth: (3) That the Bear alternately stopped and proceeded with caution at a speed of approximately 1½ miles per hour upon hearing whistles in the vicinity" 32

VI.

The court erred in ordering, adjudging and decreeing: "That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann, and from Jack Borcich, Andrew Vilicich and Bortul Zankich, in respect of the damages to the Bear, the sum of \$14,678.61, together with interest from November 30, 1948, at 7% per annum on the amount of \$14,170.67 until paid. That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Anna and from Jack Borcich, Andrew Vilicich and Bortul Zankich in respect of the loss of use of the Bear the sum of \$4,320.00, together with interest thereon at 7% per annum from November 30, 1948, until paid. That libelants and intervening libelants do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankcich, their costs of suit herein incurred. Twelfth: The District Court erred when it found: (2) That the period of 38 days was a reasonable lay-up time for bids and repairs to the Bear" 36

VII.

The Court erred when it found: "Sixth: (5) That the speed of the Marsha Ann at the time of sighting the Bear was immoderate and unwarranted under the circumstances and constituted negligence. (6) That before any steps could be taken to avert or minimize the collision, the Marsha Ann struck the Bear at almost a right angle on the starboard side of the Bear just abaft the deck house. Seventh: That the District Court erred when it found that at no time prior to the impact did the Marsha Ann take any steps to avoid the collision by reversing her engines, or coming to a complete stop. Eighth: The District Court erred when it found: (1) That the Marsha Ann was negligent or committed any faults which were the direct and sole cause of the collision and of the alleged damage. (2) That the Marsha Ann was moving at an excessive speed at the time of the said collision. Sixth: (4) That while so navigating the Marsha Ann appeared from out of the fog broad on the starboard beam of the Bear at a distance of about 40 feet. Ninth: (5) That the Bear was observing all of the rules and regulations applicable to a vessel in her situation. Tenth: The Bear was not negligent or at fault in any respect contributing to the collision. Third: The District Court erred when it did not conclude that the Oil Screw Bear was solely at fault in the said collision"..... 38

VIII.

The District Court erred when it ordered, adjudged and decreed: "That the following libelants, as crew members of the Bear, do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich, the amount set down opposite their respective names, together with interest thereon from November 30, 1948, at 7% per annum until paid, to wit: John Ancich, \$918.00; John Kaiza, \$918.00; Anton Bogdanovich, \$918.00;

Peter Svorinich, \$918.00; Martin Miskulin, \$918.00; Ray Zukowski, \$918.00; William T. Decker, \$918.00; George Korgan, \$918.00; W. H. Hoopes, \$418.00; Nick Milosevich, \$918.00. The District Court erred when it found: Fourth: That the allegations of Article I of the Ancich libel are true"..... 42

Conclusion 50

Appendix:

Assignments of errors relied upon by appellants.....App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Agwidale v. San Veronico, 153 F. 2d 869, 1946 A. M. C. 142....	43
Agwilines Inc. v. Eagle Oil and Shipping Co. (Agwidale-San Veronico), 153 F. 2d 869, 1946 A. M. C. 142; cert. den., 328 U. S. 835.....	45
Eastern Dredging Co. v. Minnisimmet Co., 162 Fed. 860.....	27
Elliott Steam Tug Co. v. Shipping Controller (Eng.), K. B. 127	45
Merchants & Miners' Transp. Co. v. Hopkins, 108 Fed. 890.....	19
Remorquage v. Bennetts (Eng.), 1 K. B. 243.....	44
Robbins Dry Dock and Repair Co. v. Flint, 275 U. S. 303, 48 S. Ct. 135, 72 L. Ed. 290.....	44, 45, 47, 48
The Beaver, 219 Fed. 134.....	35
The Benjamin A. Van Brunt, 98 Fed. 131, 38 C. C. A. 668.....	19
The City of Alexandria, 31 Fed. 427.....	31
The Federal No. 2, 21 F. 2d 313.....	44
The Flemington, 234 Fed. 864.....	21
The Manchioneal, 243 Fed. 801.....	27
The Noe G, 235 Fed. 119.....	20
The Old Colony, 52 F. 2d 992.....	22
The Peshtigo, 25 Fed. 488.....	31
The Phoenix, 58 Fed. 927.....	31
The Potomac, 105 U. S. 630, 26 L. Ed. 1194.....	43
The Rosaleen, 214 Fed. 252.....	20
The Sagamore, 247 Fed. 743.....	28
The Silver Palm, 94 F. 2d 754.....	25, 33, 35
The Tillicum, 230 Fed. 415.....	28, 29
Union S. S. Co. of New Zealand, Ltd. v. Standard Oil Co. of California, 60 Fed. Supp. 538.....	25

	PAGE
United States v. Laflin (The Lydia), 24 F. 2d 683, 1928 A. M. C. 700.....	46
Van Camp Sea Food Company v. DiLeva, 171 F. 2d 454, 1949 A. M. C. 319.....	46
Watts v. United States, 123 Fed. 105.....	31

STATUTES

International Rules, Art. L9, Starboard Hand Rule.....	14
United States Code, Title 28, Sec. 1292.....	2
United States Code, Title 28, Sec. 1333.....	2
United States Code Annotated, Title 33, Sec. 91.....	19
United States Code Annotated, Title 33, Sec. 91(a).....	17
United States Code Annotated, Title 33, Sec. 92.....	32
United States Code Annotated, Title 33, Sec. 104, Art. 19.....	31
United States Constitution, Art. III, Sec. 2.....	2

TEXTBOOKS

Griffin on Collision, p. 272.....	28
Griffin on Collision, pp. 277-278.....	30

No. 12761

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BORCICH, ANDREW VILICICH and BORTUL
ZANKICH, Co-Owners of the Oil Screw MARSHA ANN,
Appellants,

vs.

JOSEPH ANCICH, JOHN KAIZA, ANTON BOGDANOVICH,
PETER SVORINICH, MARTIN MISKULIAN, RAY ZUKOWSKI,
WILLIAM T. DECKER, GEORGE KORGAN, SAM
BILAS, W. H. HOOPES, NICK MILOSEVICH, GEORGE
KORGAN and SAM BILAS,

Appellees.

APPELLANTS' OPENING BRIEF.

STATEMENT OF JURISDICTION.

Appellees filed their respective libel and intervening libels *in Rem* and *in Personam* for Wages and Maintenance and for Collision Damages [A. pp. 3, 11 and 35]. Appellants filed their answer to the libel and intervening libels [A. pp. 20-27]. In the libels [A. p. 4] and in the intervening libels [A. pp. 13-36], it was alleged that a collision occurred on the high seas between the Oil Screw BEAR and the Oil Screw MARSHA ANN. In their answer, appellants admitted that a collision did occur between the said vessels [A. p. 21]. Appellees alleged that all of the premises in

the said libel were in the Admiralty and Maritime Jurisdiction of the United States and of the District Court [A. pp. 6-16-40], and in their answer thereto, appellants admitted the said allegations [A. pp. 25-32].

Jurisdiction of the District Court is based upon the allegations in said libel, intervening libels and answers thereto hereinabove referred to, and upon the grant of admiralty jurisdiction contained in the Constitution of the United States, Article III, Section 2, and upon Title 28, United States Code, Section 1333, which provides for original jurisdiction of any civil cause of admiralty or maritime jurisdiction in the District Courts of the United States.

The final decree in the above entitled case was entered on September 14, 1950 [A. pp. 69-71]. This appeal is from that final decree.

The jurisdiction of this Court is based on Title 28 United States Code, Section 1292, which provides that the Courts of Appeals shall have jurisdiction of all appeals from final decisions of the District Courts of the United States and upon Assignment of Errors duly filed [A. p. 77], a Petition for Appeal duly allowed and filed [A. p. 72], Citation on Appeal [A. p. 84] and Notice of Appeal served and filed [A. p. 86].

STATEMENT OF THE CASE.

Version of the Appellees.

In their respective libels and intervening libels [A. pp. 4, 13 and 37], the appellees contended that the collision in question occurred substantially as follows:

On or about November 30, 1948, at or about 11:30 o'clock A. M. (Pacific Daylight Time), the BEAR was proceeding at a speed of about $1\frac{1}{2}$ miles per hour in a generally northwesterly direction about $2\frac{1}{2}$ miles southeast of the Los Angeles Harbor Breakwater Light. A heavy fog was laying off the coast in this vicinity. At the time of the collision and for approximately one hour prior thereto, the BEAR had been sounding fog signals in compliance with the Rules of the Road. While it was proceeding through the fog, the BEAR alternately stopped and proceeded at a speed of approximately $1\frac{1}{2}$ miles per hour. Suddenly the MARSHA ANN appeared broad on the starboard beam of the BEAR at a distance of approximately 40 feet and traveling at an excessive speed. Before any effort could be taken to avert the collision the MARSHA ANN struck the BEAR at almost a right angle on the starboard side of the BEAR just aft the deck house. At this time the BEAR was purportedly dead in the water.

Version of Appellants.

In their answers to the respective libels and intervening libels [A. pp. 21 and 29] appellants contended that the collision occurred substantially as follows:

On or about the 30th day of November, 1948, between 11:00 and 11:30 o'clock A. M., the MARSHA ANN was proceeding outward through the breakwater of the San Pedro Bay in a heavy fog; visibility was limited to approxi-

mately 10 to 15 feet; the speed of the MARSHA ANN was not more than two knots; fog signals as prescribed by the Rules of the Road were being given. When the MARSHA ANN was about 200 yards outside of the said breakwater and southeast of the Los Angeles Harbor Light its radar operator notified Captain Jack Borcich that the radar screen indicated that three vessels, one to the starboard and two to the port, were heading for the entrance to the breakwater. Captain Borcich immediately disengaged the engine to let these boats enter the breakwater safely.

The MARSHA ANN had been stopped for about four minutes with no way upon her when the lookout in the bow of the MARSHA ANN called attention to a vessel (the BEAR) approximately 20 feet off the port bow of the MARSHA ANN. Captain Borcich immediately sounded the danger signals as required by the Rules of the Road. The BEAR was moving at a speed greatly in excess of moderate, which would have scarcely cleared the bow of the MARSHA ANN, when suddenly the BEAR made a turn hard to port swinging its stern toward the MARSHA ANN in such a manner as to cause the starboard beam of the BEAR to strike the stem of the MARSHA ANN.

Summary of Testimony of Appellees.

The BEAR is a wooden fishing vessel constructed in 1917 [A. p. 125]. It has an overall length of 65 feet [A. p. 103] and is owned by Sam Bilas and George Korgan [A. pp. 11 and 101]. On November 30, 1948, the BEAR, with a cargo of sardines aboard, left Oceanside between 5:00 and 5:30 A. M. to return to San Pedro [A. p. 102]. The distance between the point of departure of the BEAR and San Pedro was approximately 55 miles [A. p. 192]. This distance had to be negotiated by the BEAR before noon or approximately 11:50 A. M. [A. p. 206].

The top speed of the BEAR is about $8\frac{1}{2}$ knots [A. p. 192] and before the BEAR arrived in the vicinity of Newport it had been traveling at top speed [A. p. 147]. When the BEAR arrived in the vicinity of Newport it ran into fog for the first time that morning [A. p. 147]. The visibility was fair until the BEAR arrived at Seal Beach where the fog commenced to get very heavy [A. p. 148]. It was 10:45 A. M. when the BEAR encountered its first fog above mentioned [A. p. 222].

The BEAR was being navigated through this fog without any one designated as a lookout stationed in the bow of the BEAR [A. pp. 126 and 158]. Captain Milosevich and the cook, Mr. Ancich, were in the pilot house of the BEAR [A. p. 146] with Mr. Milosevich at the wheel [A. p. 146]. There were three other men on the top side of the BEAR. Mr. Bogdanovitch testified that he posted himself "under the green light" [A. p. 286] and testified that "part of it was my own will to go up there on a lookout" [A. p. 285]. Mr. Hoopes, the engineer of the BEAR [A. p. 136] was also standing "under the green side lights" [A. p. 136]. He was not acting as a lookout but was merely "looking out the same as anybody else would" [A. p. 136].

Mr. Miskulian was present in the pilot house and his duties immediately prior to the collision were to blow the boat's whistle when he was instructed so to do by the Captain [A. pp. 214, 222, 223, 231]. The signals given by Mr. Miskulian were not in any definite pattern. For example, Mr. Kaiza, one of the crew members of the BEAR, testified—

"When we heard, long distance from us, long whistle, long blast, then we give long blast: When we heard smaller, we give smaller." [A. p. 269.]

On the other hand, Mr. Milosevich, the Captain, testified that he told Mr. Miskulian—"If he didn't hear no boat to give it two or three a minute in that fog and slow." [A. pp. 209, 210.] Mr. Milosevich further testified that Mr. Miskulian was to blow the whistle every half minute [A. p. 194], and if there were a lot of boats, three or four times a minute [A. p. 194].

Mr. Hoopes testified that the BEAR was continuously sounding whistles and by that he meant "The answering whistles on the way through the fog and blowing their own whistles . . . I should say several times a minutes to three or four times a minute." [A. p. 138.]

Mr. Milosevich testified that upon sighting the MARSH ANN the BEAR continued to blow the same whistles "all the time, three or four times a minute." [A. p. 196.] Immediately prior thereto, however, he testified that the BEAR was blowing the whistle "one every two or three seconds." [A. p. 195.]

The BEAR reduced its speed to about four to four and a half miles per hour between 10:30 A. M. and 11:00 A. M. [A. p. 168], and prior to the collision had been moving at about a mile to a mile and a half per hour for about 10 to 15 minutes [A. p. 149]. The visibility immediately prior to the collision was from 50 to 60 feet [A. p. 137]. The MARSHA ANN was first sighted between 50 and 60 feet off the starboard beam of the BEAR [A. p. 137]. Messrs. Milosevich, Ancich and Bogdanovich testified that they saw the bow and pilothouse of the MARSHA ANN at one and the same time [A. pp. 232, 283, 298]. Indeed, Mr. Bogdanovich testified that he could even see the name on the bow of the MARSHA ANN [A. p. 298].

The speed of the MARSHA ANN was estimated by the crew of the BEAR to be anywhere from two to six miles per

hour [A. pp. 139, 176]. The MARSHA ANN was headed "right straight" for the green light of the BEAR [A. p. 130] and it purportedly struck the BEAR from eight to ten feet aft of the beam [A. p. 141] and the blow was struck "straight broadside." [A. p. 288.]

Ten seconds elapsed from the time that the MARSHA ANN was first sighted and the time of impact [A. p. 151]. In that interval the BEAR had moved from eight to ten feet [A. p. 139]. The time of the collision was 11:30 A. M. [A. p. 101], approximately 2½ miles from San Pedro [A. p. 192].

It cannot be determined from the testimony of the appellees whether the collision could have been avoided at the time the MARSHA ANN was first sighted by the BEAR. The testimony of Mr. Milosevich in this regard is as follows:

"Q. When you first sighted the Marsha Ann you realized at that time that an accident or collision was likely to happen, didn't you? [115] A. No, I didn't expect that accident going to happen." [A. p. 196.] . . . "Didn't you think, Nick, when you saw the Marsha Ann there for the first time that you were going to avoid a collision? A. No, I couldn't avoid it nohow.

Q. I mean, but you thought for just a split second that you were going to avoid it, didn't you? A. I didn't. I couldn't say that." [A. p. 201.]

After striking the BEAR the MARSHA ANN pushed the BEAR sideways for approximately four minutes [A. pp. 273, 109, 127, 173]. Mr. Korgan testified that the vessels did not become separated for about ten minutes and at that time they "just drifted apart." [A. p. 131.] Mr. Hoopes testified "they never did drift apart." [A. p. 153.]

Mr. Hoopes testified that after the impact the MARSHA ANN "was gradually moving back until it was portside to the BEAR" [A. p. 153], and Mr. Kaiza testified that "at the end of the sideward pushing of the BEAR, the two boats ended up side by side, with the bow of the MARSHA ANN back and aft of the bow of the BEAR." [A. pp. 271, 272.] The appellees were unable to testify whether the MARSHA ANN was, or was not, sounding signals at the time of the collision [A. p. 138].

Mr. Louis Sims, a marine surveyor of wooden boats, with about three years' experience [A. p. 334], testified that the BEAR was damaged in substantially the following particulars: The bulwarks of the starboard side had been broken inward and the planking cracked in the bulwarks. The main guard had been crushed and the two main deck beams had the ends crushed and the beams were split. The vessel's main decking from starboard to port was wracked and set to port [A. p. 320]. Three hanging knees on the portside had been strained and there were openings on the starboard side of the toes and the feet of the frame with openings at the knees on the portside in the heel of the knees. The hatch coaming was strained [A. p. 321]. The frames along both the starboard and port sides were broken on a line with the lower heel of the hanging knees. Four strakes of ceiling wood on the starboard side of the fish hold were broken and certain frames on the portside were broken on a line with the bottom ends of the hanging knees. The planking had been popped from its fastenings. The fastenings parted and the seams opened. The seams on both the port and starboard sides were opened at the turn of the bilge [A. p. 322]. The fore and aft ends of both the port and starboard garboard strakes had been strained and were standing out. The engine, the engine foundations and the engine fastenings

had been pulled and the engine was loose. The planking on the entire hull "had been shook up," with the "fastening started and the caulking slacked," the engine was out of alignment [A. p. 323]. He testified that the price of such repairs was \$17,770.67 [A. p. 327].

Summary of Testimony of Appellants.

The MARSHA ANN is a vessel of approximately 97 feet in length. On November 30, 1948, the MARSHA ANN was proceeding from Fish Harbor destined for fishing grounds on the high seas [A. p. 375]. She had 5,000 gallons of fuel aboard and 100 tons of water for ballast. Thus equipped she weighed around 360 to 370 tons [A. pp. 374, 375]. Her bow was approximately 18 feet from the water line. Captain Borcich and Messrs. Tudor and Zitko were on the bridge [A. p. 361]. Captain Borcich was at the wheel. The wheel is located outside and just forward of the pilothouse [A. p. 419]. Bortul Zankich was the Chief Engineer, navigator and radar operator [A. p. 421].

Steve Kuljis was stationed in the bow of the MARSHA ANN as a lookout [A. pp. 363, 385, 428, 509].

As the MARSHA ANN traveled through the harbor it began to meet fog in the middle of the bay [A. p. 389]. The visibility was limited. Captain Borcich immediately ordered Mr. Zankich to turn on the radar set [A. p. 375]. Thereafter Mr. Zankich remained in the radar room [A. pp. 385, 436] reading the radar screen [A. p. 424] and giving continual radar reports to Captain Borcich [A. p. 429]. When the MARSHA ANN was abeam

of the breakwater, Mr. Zankich told Captain Borcich that there was one boat between one and two points off the starboard bow and two boats 45 degrees to port [A. p. 425]; one of the boats to port was erratic in its direction, and upon being notified of this by Mr. Zankich, Captain Borcich immediately stopped the engine [A. pp. 426 and 428]. The radar operator then continued to observe the progress of these three boats until they passed off the radar screen into the 'blind spot' [A. p. 443]. The blind spot herein referred to is that area within 200 yards of the MARSHA ANN since the radar set would not pick up any object within that distance [A. p. 422].

The engine of the MARSHA ANN had been stopped for approximately five or six minutes [A. pp. 362, 378, 426] and she was drifting [A. p. 382]. While the MARSHA ANN was so drifting, the visibility was about 25 feet [A. p. 510]. The running lights and the mast light of the MARSHA ANN were lighted [A. pp. 364, 384]. Captain Borcich was sounding two blasts on his fog whistle. Each blast was from four to six seconds duration and were separated by about one second. These blasts were repeated at intervals of not more than a minute and a half [A. pp. 378, 426, 427]. After the MARSHA ANN had been drifting for about five minutes, the BEAR was sighted approximately 20 feet off the port bow of the MARSHA ANN [A. pp. 361, 362, 379]. The BEAR was coming toward the MARSHA ANN at a speed of approximately seven miles per hour [A. p. 383]. Immediately upon sighting the BEAR, Captain Borcich gave the danger signal of four blasts on his whistle [A. pp. 380 and 430]. When the BEAR was

approximately 15 feet away from the bow of the MARSHA ANN it turned hard to port [A. pp. 363, 372, 382] and commenced swinging her stern into the stem of the MARSHA ANN [A. pp. 428 and 511]. The collision occurred at 11:00 o'clock in the morning according to the clock aboard the MARSHA ANN [A. p. 421] and approximately 600 feet southeast of the lighthouse [A. pp. 375, 385].

The impact of the starboard beam of the BEAR as it swung its stern into the stem of the MARSHA ANN was not very severe since it moved Mr. Kuljis, the lookout stationed in the bow of the MARSHA ANN only two or three feet [A. p. 515] and indeed did not even spill the food that was on the stove in the galley of the MARSHA ANN [A. p. 504]. The MARSHA ANN did not push the BEAR sideways [A. p. 365] and immediately after the impact the BEAR continued its turn hard to port and then reversed and slid back alongside the MARSHA ANN [A. pp. 411, 511]. The MARSHA ANN then threw lines to the BEAR and secured her alongside and brought her into the harbor [A. pp. 128, 129].

Mr. Williams, a marine surveyor with 35 years experience, testified on behalf of the appellants concerning the damage occasioned the BEAR by the collision [A. p. 446]. There was no question as to the qualifications of Mr. Williams since one of the Proctors for the appellees was willing to stipulate to same and indeed at one point notified the Court that he did not believe further foundation was necessary for certain questions since he was familiar with Mr. Williams' reputation [A. p. 449]. The

damage in question was to the starboard side of the BEAR just aft and adjacent to the rigging. The planks in that area immediately below the guard were damaged and two planks on the portside were loosened at the seams. The knees in the hold showed signs of movement and some of the frames in that area were broken. The rail cap was broken. The waterway plank or covering board was crushed and some of the deck seams in that immediate area were loosened [A. pp. 455-6 and 536-7].

Mr. Williams estimated the amount of damage to be about \$6500.00 and Mr. DeFever, with whom he was associated, estimated the damage to be approximately \$5900.00 [A. pp. 456 and 539]. The time necessary to make the required repairs to the BEAR was from 20 to 25 days [A. pp. 459 and 540].

In examining the BEAR after the collision both Mr. Williams and Mr. DeFever found that the BEAR was rotten in many areas [A. pp. 448, 451 and 539]. Many of the breaks, particularly those in the frames on the portside and those breaks in the bilge area, were old as evidenced by the presence of dirt and filth that was lodged in the break and by the discoloration of the break [A. pp. 453, 488-9 and 537]. To repair the damage occasioned by the collision it was necessary only to repair the guard rail and bulwark rail, replace a section of the covering board, recaulk the deck in that area, recaulk the loosened planks on the portside, repair slight damages to the rigging, check and realign the engine shafting, and paint the vessel in the damaged areas [A. p. 538].

It was not necessary to refasten or recaulk all the planks nor was it necessary to remove some of the sheathing on the outside of the planking in the stern or work on the seine table. It was not necessary to stiffen the engine beds nor paint the superstructure and other portions of the topside of the vessel which were not damaged [A. p. 538].

SPECIFICATIONS OF ASSIGNED ERRORS RELIED UPON BY APPELLANT.

Appellants rely on Assignments of Errors numbered First [A. p. 78]; Third [A. p. 80]; Fourth, Sixth (1), (2), (3), (4), (5), (6), (7) [A. pp. 80, 81]; Seventh; Eighth (1), (2) [A. pp. 81, 82]; Ninth (2), (3), (4), (5) [A. p. 82]; Tenth; Eleventh (3), (4), (6), (7), (8) [A. pp. 82, 83]; Twelfth (2) [A. p. 83].

Because of the length of the aforementioned Assignments of Errors, they are printed herein as an Appendix to this Brief.

In essence these Assignments of Errors relied upon by appellants relate to the findings of the Court to the effect that the MARSHA ANN was solely at fault for the collision in question and the failure of the Court to find that the collision was caused by the fault of the BEAR and its crew. Appellants further contend that it was error for the Court to order, adjudge and decree that the respective members of the crew of the BEAR recover damages from appellants. It is also the contention of the appellants that the damages awarded to the owners of the BEAR for the injury to the BEAR and for detention were excessive.

SUMMARY OF ARGUMENT.

It is the position of the appellants that the MARSHA ANN was not at fault for the collision and they strenuously urge that the collision was caused by the fault of the BEAR. As will be shown hereinbelow, the BEAR had come to within two or two and a half miles of San Pedro from Ocean-side in a little more than five and a half hours. To travel all this distance in such a short time, the BEAR had to travel at top speed all the way. If it had stopped and "felt its way along," it would have been well into the afternoon before it reached the point at which the collision occurred. This excessive speed of the BEAR is sufficient to stamp it as the offending vessel in this collision.

The testimony of the crew of the BEAR was unanimous and clear to the effect that various indiscriminately blown signals were being sounded by the BEAR prior to and at the time of the collision. Indeed even the Trial Court commented that the BEAR was attempting to answer the whistles of the other vessels. Too clear for extended discussion is the rule that in times of limited visibility and especially fog a vessel must sound fog signals in compliance with the Rules of the Road at Sea. Again it must be said that this fault alone would be sufficient to cause the liability for this collision to be upon the BEAR.

The Starboard Hand Rule (Article L9 of the International Rules) specifically provides that when two steam vessels are crossing so as to involve the risk of collision the vessel which has the other on her starboard side shall keep out of the way of the other. By the testimony of the crew of the BEAR the MARSHA ANN was off the starboard side of the BEAR. Therefore it is clear that the burden was upon the BEAR to keep out of the way of the MARSHA ANN. The fact that she did not so do was an-

other fault which contributed to the occurrence of the collision.

The testimony of the BEAR is clear to the effect that there was no one stationed in the bow of the BEAR as a lookout. It is elementary that to avoid danger it is necessary to first apprehend that danger exists. The fact that the visibility according to the crew of the BEAR was limited to from 50 to 60 feet made it even more imperative that a lookout be stationed as far forward in the vessel as possible and as close to the water line as possible. Again it must be said that this was a grievous fault on the part of the BEAR.

It is undisputed that the MARSHA ANN was sounding the proper fog signals at the time of the collision. It is further demonstrated hereinbelow that immediately prior to the collision the MARSHA ANN was forward of the beam of the BEAR. It was the duty, therefore, of the BEAR to stop her engines and navigate with caution when hearing these fog signals, but as already indicated above the BEAR was proceeding at such an excessive rate of speed that it could not reasonably be said that it was navigating with caution commensurate with the existing circumstances. Surely this must be assigned as a further fault on the part of the BEAR.

The amount of damages awarded by the Court to the owners of the BEAR for injury to the BEAR and for loss of use of the BEAR were clearly excessive. There is no conflict in the testimony to the effect that the BEAR was an old, wooden boat built as early as 1917 and throughout the years it has been exposed to the elements and to the wear and tear that of necessity accompanies the use of a vessel for fishing purposes. The evidence showed that many of the wounds, injuries and breaks in the BEAR were old and

of long standing and that they were not occasioned by this collision and should not have been charged as costs for repairs necessitated because of this collision.

It follows from this that the amount of time allowed by the Court for repairs was excessive in that it included time necessary to make the repairs which were not occasioned by the collision.

The libel of the fishermen appellees did not state facts sufficient to constitute a claim against these appellants because the damages prayed for were too remote. In effect they were attempting to hold the appellants liable for the expected fruits of their contract with the owners of the BEAR. However, the law is clear that a third person who negligently interferes with the performance of a contract between two other persons is not liable for damages flowing therefrom in the absence of malice or intent.

At the conclusion of the trial the Court stated that it believed the engines of the MARSHA ANN were stopped at the time of the collision. The evidence of the appellants shows that they had been so stopped for approximately five minutes and that the MARSHA ANN could not have been traveling at an excessive speed. Likewise the evidence shows that the proper fog signals were being sounded by the MARSHA ANN and that she had a lookout stationed in her bow. This testimony is undisputed. In view of this, it is the contention of the appellants that the MARSHA ANN was proceeding cautiously and carefully with due regard of all of the existing circumstances and that it was not at fault in any particular in respect to this collision.

ARGUMENT.

I.

The Court Erred When It Found:

“Sixth: (2) That at the time of the said collision and for more than an hour preceding the same the Bear was sounding fog signals in compliance with the applicable rules of the road.

“Ninth: (2) That the Bear was manned by a competent crew.

“Ninth: (3) That the Bear was well and carefully navigated.”

The testimony of the appellees was to the effect that the BEAR was under way with way upon her [A. p. 149]. The sound signals required under the circumstances are prescribed by 33 U. S. C. A. 91(a) as follows:

“A steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast.” (Italics added.)

It is undisputed that the appellees were not sounding the proper signals in accordance with this rule and in fact were not sounding any signals even remotely similar to those required by this rule. Reference need only be made to the testimony of the appellees for proof of this. For example, Mr. Miskulian, who was in charge of the whistle aboard the BEAR, testified:

“Q. Did you operate the boat’s whistle? A. Yes. I pulled when he told me.

Q. When who told you? A. Nick Milosevich is who.” [A. p. 214.]

.

“Q. All right. Did you blow the whistle when Nick told you to or did you blow it on your own volition? A. When he told me. When he told me, then I pulled.

Q. In other words, if he would say to pull it, then you would pull it, and if he did not say to pull it, you would not? A. Yes.” [A. p. 222.]

Mr. Milosevich substantiated the testimony of Mr. Miskulian to this effect [A. p. 222]. But when did Mr. Milosevich tell Mr. Miskulian to blow the whistle, or to put it otherwise, what kind of signals was Mr. Miskulian told to give? Mr. Milosevich testified to various signals at various times. For example, at one time he said that he—

“told him (Miskulian) if he didn’t hear no boat to give it two or three a minute in that fog and slow.” [A. pp. 209-210.]

Earlier Mr. Milosevich testified that:

“We was blowing four or five times a minute.” [A. p. 175.]

Then again Mr. Milosevich testified:

“We was blowing one every two or three seconds.” [A. p. 195.]

Mr. Miskulian testified at one time that he would blow the whistle “five or six times in one minute.” [A. p. 224.]

What is the truth about the “whistle blowing” of the BEAR from this maze of contradictory and inconsistent testimony on the part of the crew of the BEAR? Mr. Kaiza testified:

“The Witness: When we heard, long distance from us, long whistle, long blast, then we give long blast: When we heard smaller, we give smaller.” [A. p. 260.]

In brief, the BEAR not only failed to sound proper fog signals but in fact even failed to sound any consistent signals. It merely answered the whistles of other vessels. The Trial Court expressed this fact as follows:

“I am impressed by the witness who said that as the Bear proceeded along it tried to answer whistle for whistle. That is, if it heard a whistle out here some distance that gave a sort of a long toot, it answered with the same kind of a whistle, indicating that it heard that fellow. If someone over here pulled a short one, the BEAR answered with a short one.”
[A. p. 674.]

Can it be said that when a vessel answers whistle for whistle, whether it be a prolonged whistle or a short whistle, that it is complying with the International Rules of the Road at Sea, which requires specific signals for certain given situations? To state the question is to answer it, for certainly nothing could be more confusing to the traffic on the high seas than to hear indiscriminately sounding long and short blasts without any regard to the meaning thereof.

The provisions of 33 U. S. C. A. 91 are mandatory, not discretionary, and their “imperative” nature (*Merchants & Miners’ Transp. Co. v. Hopkins*, 108 Fed. 890, 894) imposes upon the master of a vessel the grave obligation to sound the prescribed fog signals at the risk of being grossly at fault for failing to so do. The importance of the provisions of this section are illustrated by the following cases:

In the case of *The Benjamin A. Van Brunt*, 98 Fed. 131, 38 C. C. A. 668, the Court of Appeals of the First Circuit had before it the case of a collision between the *Pilgrim*, a passenger steamer, and the schooner *Van Brunt* while the latter was at anchor. The *Van Brunt* was lying

at anchor in the channel in front of the city of Fall River and had been so anchored for some days. The Pilgrim knew she was anchored there. The fog was dense. The Van Brunt was not sounding her fog bell, and the Pilgrim hearing no sound proceeded in the fog and ran into the Van Brunt. It was contended that under the circumstances the Pilgrim should have stopped and that her lookout service was not sufficient. The Court overruled both these contentions and found that the collision was caused by the failure of the Van Brunt to ring her fog bell, that the Pilgrim was not in fault, and approved the decree of the District Court in awarding all the damages against the Van Brunt.

And in *The Noe G*, 235 Fed. 119, which was a case arising out of a collision between a vessel named the Noe G and the L'Etruria, the Circuit Court of Appeals of the Ninth Circuit affirmed the District Court, which had found that both vessels were at fault in the said collision. The Court found that the L'Etruria sighted the Noe G when the vessels were approximately 48 to 50 feet apart; that the Noe G did not sight the L'Etruria until said vessels were from 10 to 15 feet apart and that had the lookout on the Noe G been properly stationed he could have seen the L'Etruria when she was at least 40 to 50 feet distant; that the L'Etruria had not, prior to the collision, been blowing her fog horn. As a result of these findings the Court overruled the contention that the failure of the Noe G to have a lookout properly stationed was the sole fault of the collision and ruled that even though the Noe G should have sighted the L'Etruria at a safer distance, the L'Etruria was herself in fault for failing to sound the proper fog signals.

In the *Rosaleen*, 214 Fed. 252, a ferryboat was held to be in fault for a collision in a fog with a scow anchored

at a place in the Hudson River, where she had been for at least two years. It was manifest from the evidence introduced at the trial of the cause that the ferryboat was moving at a speed greatly in excess of moderate in view of the circumstances then existing. In that she was unable to stop in her share of the distance between herself and the scow, after sighting the scow. Despite this flagrant fault, the Court refused to hold that the ferryboat was solely at fault for the reason that it was shown that the scow had not been giving required fog signals. In its decision, the Court said:

“The Rosaleen (the scow) *was undoubtedly* in fault for not giving fog signals, and *if she had been a new comer on the field of operations, of which the Albany had no notice, we should be inclined to hold her solely in fault for the collision.* But her presence was well-known to the Albany; her general location, 300 to 400 somewhat to westward of the Prairie, was also known.” (Italics ours.)

The language of this decision must be given special note, for a plain reading of the above excerpt clearly indicates that had the position of the scow not been known to the ferryboat for sometime, the scow would have been held solely at fault for failing to sound proper fog signals, even though the ferryboat was obviously traveling at an excessive rate of speed.

It is important to note that the sounding of improper fog signals is as gross a fault as the failure to sound fog signals at all. In *The Flemington*, 234 Fed. 864, a ferryboat, The Syracuse, was held at fault for failing to sound the regulation fog signals. The Court said:

“We think the evidence shows that the Syracuse did not sound the regulation fog signals. *She did*

blow a series of short toots, but the law does not provide for such signals and the absence of the regulation long blast signals may well have confused and misled the master of the *Flemington*. Certainly the burden was on the *Syracuse* to show that the failure to blow the long blasts, as required by law, did not contribute to the injury. We do not see how we can say that this clear violation of the rules might not have caused or contributed to the collision. As was said by the Supreme Court in *The Pennsylvania*, 19 Wall. 125, at page 136, 22 L. Ed. 148:

‘But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.’ ”

See also:

The Old Colony, 52 F. 2d 992, 996.

In the face of the decisions hereinabove cited, it cannot be said that the appellees proved that the improper and inconsistent fog signals blown by the *BEAR* and her failure to blow the proper signals might not have been one of the causes of the collision. In any event there is certainly no evidence of any kind to indicate that the appellees have satisfied this burden and in fact a re-examination of the testimony offered by the appellees, which is referred to hereinabove, clearly demonstrates that the signals blown by the *BEAR* were a major factor in the occurrence of this collision.

II.

The District Court Erred When It Found:

“Sixth: (1) That at the time of the said collision the Bear was proceeding at a speed of about 1 to 1½ miles per hour.

“(7) That at the time of the said collision the Bear was virtually dead in the water.

“Eleventh: (3) That the Bear was not traveling at an excessive speed under all the circumstances.”

The testimony of Mr. Korgan, one of the owners of the BEAR, was to the effect that the BEAR left the vicinity of Oceanside between 5:00 and 5:30 A. M. on the day of the collision [A. p. 102]. Mr. Milosevich testified that from Oceanside to San Pedro it was approximately 55 miles [A. p. 192]. Mr. Milosevich further testified that:

“We were supposed to be there maybe around 10 minutes before noon.” [A. p. 206.]

Presuming that the collision took place approximately 2½ miles from San Pedro, this means that the BEAR was to negotiate about 52½ to 53 miles in a little bit more than six hours. To cover that distance, the BEAR would have to travel at its top speed of approximately eight to eight and a half knots; that the BEAR did travel at its top speed all the way and that it did not slow up when it hit the fog off Newport is substantiated by the following testimony of the crew of the BEAR.

Mr. Milosevich testified that the fog got dense and the visibility down to 50 to 60 feet when the BEAR was about

35 to 40 minutes to the jetty [A. p. 207]. At that point in his testimony, Mr. Milosevich was asked:

“Q. Well, when you say 35 or 40 minutes to the jetty traveling at eight and one-half miles per hour?

A. Going ahead.

Q. Is that right? A. Yes. Not to the jetty. Don't you take me wrong. We slow down when we hit the fog.” [A. p. 207.]

Upon examination by his own proctor, Mr. Milosevich said:

“Q. When you picked out a point there and said that it was 35 or 40 minutes from that position to the jetty did you mean in clear weather or foggy weather?

A. That was in foggy weather where we was there.

Q. And the dense fog that you were talking about when the Marsha Ann hit you? A. Yes.” [A. p. 241.]

Surely there can be no question that Mr. Milosevich expected to travel the distance between the point where he said the fog became dense and San Pedro in 35 to 40 minutes. How far was that distance? Again, according to the testimony of Mr. Milosevich, the answer was:

“The Witness: Yes. We was right here about seven or eight miles off.” [A. p. 206.]

The testimony of Mr. Milosevich is further substantiated by another member of the crew of the BEAR, Mr. Hoopes [A. pp. 147, 148].

If there remains any doubt as to the speed of the BEAR while it was traveling through the fog, this doubt is dispelled when we make further reference to the testimony of

Mr. Milosevich when he was being questioned by one of his own proctors:

“We was going more ahead all the time. We was from the jetty about two and a half miles approximately, not quite three miles to the jetty. But I can recall that easy, because by that time 11:30, it takes about 20 more minutes to get there. We be there pretty near noon. I know exactly where we were holding course for her.” [A. p. 241.]

If Mr. Milosevich expected to go two and a half miles in 20 minutes, the BEAR clearly was not traveling at one and a half miles per hour, rather it was moving at a speed of approximately seven and a half miles per hour. This latter speed, of course, is consistent with the testimony of the crew of the BEAR as hereinabove outlined and is in line with the various distances traveled by the BEAR between the points designated hereinabove.

From the above it can be readily seen that the speed of the BEAR was greatly in excess of moderate under the conditions prevailing at the time of the collision. The well established rule in this Circuit and indeed in all of the admiralty jurisdiction in the world is that a vessel shall not proceed in a fog at a speed at which she cannot be *stopped dead in the water in one-half the visibility before her*. (See *Silver Palm*, 94 F. 2d 754, 757, and the cases therein cited. See also *Union S. S. Co. of New Zealand, Ltd. v. Standard Oil Co. of California*, 60 Fed. Supp. 538, 539.)

The testimony of the crew of the BEAR was to the effect that the limit of visibility was approximately 50 feet [A. p. 137]; that the MARSHA ANN when first sighted was approximately 50 feet away [A. p. 137]; that at the speed at which the BEAR was traveling it would have taken the length of the BEAR to stop [A. p. 265-6]; that the overall

length of the BEAR was 65 feet [A. p. 103]. The BEAR could not have stopped in less than 65 feet but the stopping distance permitted the BEAR under the law hereinabove quoted was between 25 and 30 feet. It must be admitted that the speed of the BEAR was excessive and this excessive speed was a contributing cause of the collision for this reason. The point of impact was at the starboard beam of the BEAR or approximately 25 to 30 feet off of the foremost part of the BEAR. If the BEAR had been able to stop within its allotted stopping distance, to wit, 25 to 30 feet, instead of the distance equal to its length (65 feet) the collision would have been completely averted and the MARSHA ANN would have safely cleared the stem of the BEAR.

III.

The Court Erred When It Found:

“Ninth: (4) That the Bear was maintaining a proper and efficient lookout.

“Eleventh: (7) That the position of the lookout on the Bear on the open bridge was reasonable and proper under all the circumstances of the case.

“(8) That the position of the Bear’s lookout did not contribute to the collision; that it would have happened regardless of where the lookout was stationed.”

Too obvious for extended consideration is the fact that the first step toward avoiding danger is to be aware of it and consequently the sooner the danger is discovered the sooner precautions may be taken to avoid collision. Since a lookout is “the eyes and ears of the ship” (*The Sagamore*, 247 Fed. 243) upon whom the safety of a ship’s forward movement depends, it is manifest that he be stationed

where his vision will be of the most benefit, not only to his ship but to other ships that his vessel might encounter. Where is that station? In *Eastern Dredging Co. v. Minnisimmet Co.*, 162 Fed. 860, 861, the Court said:

“The Supreme Court has been constantly rigid in holding vessels to maintaining lookouts as far forward and as near the water as possible.”

And in the *Manchioneal*, 243 Fed. 801, it was said:

“By the overwhelming weight of authority it is settled that the proper place for a lookout is, under ordinary circumstances, on the bow.”

The testimony of one of the owners of the BEAR indicates that he had designated no one to keep watch on the bow [A. p. 126]. This testimony is substantiated by that of one of the members of the crew [A. p. 158]. Mr. Bogdanovich said that he had come topside of his own will to act as a lookout [A. p. 285] and there was no positive evidence that he had been designated to act as a lookout or, if so, who had so instructed him. Mr. Hoopes testified that although he was topside he was:

“A. Not exactly as a lookout, except to the interests of myself and the crew. While I was on deck I was looking out the same as anybody else.” [A. p. 136.]

Surely, none of the above testimony can be stretched to indicate that the skipper had instructed any of the aforementioned persons to act as lookouts aboard the BEAR. Mr. Milosevich could not have been the lookout because he was at the wheel [A. p. 146]. As we already know, Mr. Miskulian was in charge of the whistle and was continually talking back and forth with Mr. Milosevich, who was

telling him when to blow the whistle [A. p. 214]. This leaves only Mr. Ancich, who was the cook aboard the BEAR. However, on the day in question he was in the pilot-house "close to the icebox" [A. p. 276].

Again it must be said that this man was not a properly designated lookout since it is clear that a lookout must be stationed in the bow and should not have any other duties as above shown.

In any event in case of fog the lookout should not be stationed in or near the pilothouse. See:

The Tillicum, 230 Fed. 415;

The Sagamore, 247 Fed. 743 and

Griffin on Collision, p. 272.

In the *Sagamore*, *supra*, the Court had occasion to consider the failure of the *Sagamore* to have a lookout stationed on the bow though it did have a lookout in the crow's nest. In rendering its decision, the Court said:

"The denser the fog and the worse the weather the greater the cause for vigilance. A ship cannot be heard to say that a lookout was of no use because the weather was so thick that another ship could not be seen until actually in collision. *Marsden on Collision at Sea* (6th Ed.) 472, 474.

"In the present case, we are of the opinion that while the stationing of a lookout in the crow's nest was a proper precaution, *yet this did not justify the withdrawal of the lookout or lookouts from the ordinary station on the bow*. Great difficulty in seeing does not justify abandonment of efforts to see, but, on the contrary, requires the stationing of men 'to see if they can see'." (Italics ours.)

The following language was used by the Circuit Court of Appeals of the Ninth Circuit when it affirmed the decree of the District Court which held that the tug *Tillicum* was at fault for having its lookout stationed in the pilot-house in a dense fog.

“Had the tug had a proper lookout, properly placed, no one can say whether, even with the bad navigation of the *Rosalie*, the latter might not have been seen or her whistles heard by the *Tillicum*, and the collision avoided. It appears that the master and pilot of the tug was navigating her at the time, *and that her lookout, Capt. Charlesworth, was in the pilot house with him*, where not only the opportunity of seeing and hearing was lessened, but where the attention of both lookout and pilot was liable to be, and may have been, distracted by conversation.”

Clearly, the principles above set forth are well established as the cited cases prove and as applied to the facts of the instant case we cannot escape the conclusion that the BEAR was at fault in having its lookouts, if such they can be so-called, on the pilot deck instead of on the bow, which was at least 25 to 30 feet forward of the pilothouse. The undisputed testimony of the crew of the BEAR shows that visibility was 50-60 feet, yet 30 feet of that visibility was wasted by the BEAR on the area between the pilot deck and the bow. In brief, by stationing its lookouts on the pilot deck the BEAR reduced the visibility by 25 to 30 feet. Granted this added visibility, would the danger of collision not have been markedly reduced? Surely, this question must be answered in the affirmative.

Further it must be concluded that the BEAR was at fault in failing to have a lookout who had no other duties. The rigidity with which this rule is enforced by the courts is evidenced by the following excerpt from Griffin on Collision, pages 277, 278:

“The importance of unbroken vigilance on the part of the lookout is so great that, on vessels of any size, the rule is definite that the lookout must be no other duty.

“The lookout should ‘have no other duties to perform’ (*Chamberlain v. Ward*, 21 How. (62 U. S.) 548, 571 (1859); *The Colorado*, 91 U. S. 692, 698 (1876)). So a deckhand who has other duties, is not a proper lookout (*the Pavonia*, 26 Fed. 106 (1885)); *Brooklyn Ferry Co. v. U. S.*, 122 Fed. 696 (1903); *the Supply No. 4*, C. C. A. 2, 109 F. 2d 101, 1940 A. M. C. 188; nor is the helmsman (*the Pilot Boy*, C. C. A. 4, 115 Fed. 876 (1902)); nor a sailor who also has charge of the navigation and of sounding the fog-horn (*the Energy*, 42 Fed. 301 (1890); *cf. the Nacoochee*, 137 U. S. 330 (1899)). The navigating officer is not a sufficient lookout (*Larsen v. the Myrtle*, 44 Fed. 779 (1890); *the W. H. Beaman*, 45 Fed. 125 (1891); *the J.G. Gilchrist*, C. C. A. 2, 183 Fed. 105 (1910)).”

IV.

The Trial Court Erred When It Found:

“Eleventh: (6) That under the circumstances of this case, Article 19 of the International Rules does not apply.”

The appellees testified that the MARSHA ANN was under way and was traveling from two to six miles per hour when sighted by the BEAR [A. pp. 139, 176]. If this testimony be accepted, then it must be held that the vessels were on crossing courses and it was the duty of the BEAR, as the burdened vessel, to keep out of the way of the MARSHA ANN.

33 U. S. C. A., Section 104 (Art. 19) provides as follows:

“When two steam vessels are crossing so as to involve the risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.”

The Trial Court held that this rule did not apply. It is the contention of the appellants that the Court erred when it so finds for the following reasons:

In the *Peshtigo*, 25 Fed. 488, 490, the Boscobel had the Tempest on her starboard side and even though a dense fog was prevailing the Court held that the Boscobel was at fault in failing to keep out of the way of the Tempest. To the same effect are the following cases which applied the starboard hand rule and in each instance the collision occurred in a dense fog:

Watts v. United States, 123 Fed. 105, 113;

The Phoenix, 58 Fed. 927, 928;

The City of Alexandria, 31 Fed. 427.

That the reasoning of the above cases is sound is apparent for the following reasons: Presume that two vessels are on crossing courses and when both are a given distance from the point where their courses would intersect they become aware of each other and come to a stop. What happens? Unless there is a uniform rule to follow whereby one vessel gives way to the other, neither vessel could safely move on its course again without danger. Quite obviously, therefore, the starboard hand rule must be applied even in fog, especially when, as in the instant case, the burdened vessel sighted the privileged vessel at least ten seconds before the collision according to the testimony of the crew of the BEAR and therefore had the opportunity to keep out of the way of the MARSHA ANN. This fact becomes even more evident when it is considered that the further testimony of the crew of the BEAR was to the effect that it would take the BEAR only 4-5 seconds for its engines to take hold in reverse [A. p. 182].

V.

The Court Erred When It Found:

“Eleventh: (4) That the Bear was stopping her engines and navigating with caution.

“Sixth: (3) That the Bear alternately stopped and proceeded with caution at a speed of approximately 1½ miles per hour upon hearing whistles in the vicinity.”

33 U. S. C. A., Section 92, provides as follows:

“A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then

navigate with caution until danger of collision is over.”

In *The Silver Palm*, 94 F. 2d 754, the Circuit Court of Appeals of the Ninth Circuit was called upon to consider the application of the above rule and in its opinion it said:

“Probably the most imperative mandate of the International Rules is contained in article 16, requiring a vessel to stop her engines at once upon hearing a vessel in the fog forward of her beam.”

And at page 761:

“No command is more imperative on a steam vessel proceeding in the fog than that instanter on her hearing the whistle of a concealed vessel forward of her beam the engines shall be stopped. As with the blowing of two whistles in violation of the rule, the regulation places upon the violator the severest burden of proof in collision cases. In the case of the *Beaver-Selja* collision this court condemned a vessel proceeding in a fog, *where the violation of the rule occurred 20 minutes* before the collision. The violator was condemned, although the opposing vessel admitted liability for maintaining, in a dense fog, a speed in excess of that claimed against the *Silver Palm*. The *Beaver* (C. C. A. 9) 219 Fed. 134, 137.

“The Supreme Court in affirming held, concerning violations of the stop engines of article 16, that: ‘The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator, discretion as to what shall be “moderate speed” in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him. The difficulty of locating the direction or source from which sounds proceed in a fog renders it not necessary to dwell upon the pur-

pose and obvious wisdom of this second paragraph of the rule'; and the rule as to the burden of proof to be: "Not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." ' *Lie v. San Francisco & Portland S. S. Co.*, 243 U. S. 291, 296, 298, 37 S. Ct. 270, 272, 61 L. Ed. 726."

In the case at bar there is absolutely no question but that the required fog signals were being given by the MARSHA ANN [A. p. 378] and that she was forward of the beam of the BEAR immediately prior to the collision when the said signals were being sounded. The physical facts relative to the point of impact and the conformation of the wound in the BEAR indicated conclusively that the MARSHA ANN could not have been aft of the beam of the BEAR immediately prior to the impact. To prove this we need only review the testimony of the crew of the BEAR. It was to the effect that the BEAR was traveling about one and a half miles per hour [A. p. 149] and from the time she first sighted the MARSHA ANN until the time of the impact she had moved forward from eight to ten feet [A. p. 139]. If the BEAR had been traveling at a speed of one and a half miles per hour, it would move 2.2 feet per second. The crew of the BEAR further testified that from the time the MARSHA ANN was first sighted to the time of the collision about ten seconds elapsed [A. p. 151]. If only ten seconds elapsed and if, as contended by the appellees, the BEAR was traveling one and a half miles per hour, the BEAR moved approximately 22 feet from the time she first sighted the MARSHA ANN and the time of the collision. We see,

therefore, that from the testimony of the BEAR's own crew it traveled more than ten feet in the interim between the time the MARSHA ANN was sighted and the time of collision. If the testimony of the BEAR's crew is to be accepted as true, the point of impact would have been considerably aft of the beam and much closer to the stern. It must therefore be concluded that when the MARSHA ANN was first sighted she was not bearing on the green light of the BEAR but was well forward of the green light and indeed was well forward of the bow of the BEAR.

From the above it can be seen that it was the duty of the BEAR to stop immediately upon hearing the fog signals of the MARSHA ANN forward of her beam and the BEAR was at fault in failing so to do. If the BEAR had stopped her engines upon hearing the said signals and if the MARSHA ANN was traveling at the rate of speed claimed by the appellees, the MARSHA ANN would have passed the point of collision and the collision would not have occurred.

In the celebrated case of *The Beaver*, 219 Fed. 134, already quoted from in the excerpt from the *Silver Palm*, *supra*, the Court was faced with a very similar problem and said:

“Had the master of the Selja stopped her engines when he first heard the whistle of the Beaver, practically right ahead, as he himself testified, or at almost any time thereafter during the ten or more minutes that the Beaver was sounding her whistle every 35 seconds, manifestly the collision *could not have occurred*. for at the rapid and unlawful speed at which the Beaver was going she would necessarily have passed the point of collision.”

VI.

The Court Erred in Ordering, Adjudging and Decreeing:

“That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann. and from Jack Borcich, Andrew Vilicich and Bortul Zankich, in respect of the damages to the Bear, the sum of \$14,678.61, together with interest from November 30, 1948, at 7% per annum on the amount of \$14,170.67 until paid.

“That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vili-cich and Bortul Zankich in respect of the loss of use of the Bear the sum of \$4,320.00, together with in-terest thereon at 7% per annum from November 30, 1948, until paid.

“That libelants and intervening libelants do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich, their costs of suit herein incurred.

“Twelfth: The District Court erred when it found:

“(2) That the period of 38 days was a reasonable lay-up time for bids and repairs to the Bear.”

It has already been shown in the statement of the case above that the BEAR was an old wooden vessel built in about 1917 [A. p. 125]. Mr. Williams, the marine surveyor of about 35 years' experience, whose reputation was readily admitted by the proctors for the appellees, testified

that a great portion of the BEAR was rotten [A. pp. 448, 451]. He was substantiated in this testimony by Mr. DeFever [A. p. 539]. This testimony was in no way refuted by the surveyor of the appellees. In fact he said that he did not know whether certain portions of the BEAR were rotten or not [A. p. 338]. In any event it is clear from an objective review of all of the evidence presented that having been exposed to the elements for more than thirty years on the seas the BEAR was clearly not in good condition prior to the collision.

It was shown that when repairs were made to the BEAR they were not confined to those necessitated by the collision. For example, approximately 44 ribs were put in the starboard side of the vessel when in fact only 12 or 14 were necessary [A. p. 490]. The amount of money necessary to put in these added ribs was sizable when it is realized that the cost of installing each rib is \$40.00 [A. p. 457]. It was also shown that it was much cheaper to plug the frames than it was to put in sister frames [A. pp. 477, 478].

The frames on the port side [A. p. 537], the bilge area [A. p. 453] and many other old breaks [A. pp. 488, 489] were repaired and the charge assessed to this collision when it was clear from the testimony and from photos introduced in evidence that the breaks in these respective areas were old as indicated by the dirt and debris adhering to the broken portions [A. pp. 453, 488-9]. When the cost of these unnecessary repairs are totaled and deducted from the amount awarded by the Court for damages to the BEAR, it is clear that the true amount of damages is closer to the figure estimated by Mr. DeFever, to wit, \$5900.00 [A. p. 539], and in any event not in excess of the \$6500.00 estimated by Mr. Williams [A. p. 456].

The Court awarded the owners of the BEAR \$4,320.00 for damages in respect to loss of use of the BEAR for a period of 38 days [A. p. 65]. Since, as it has already been shown above, many of the repairs made to the BEAR were not required by the collision, it follows that the time necessary for these repairs should not be 38 days but much closer to 20 to 25 days as properly estimated by Mr. DeFever [A. p. 540].

Briefly, it is the position of the appellants that, at best, an owner is entitled to the cost of the repairs of the damage proximately caused by the collision. Clearly he is not entitled to “make over” an aged vessel and thereby profit by the misfortune of another.

VII.

The Court Erred When It Found:

“Sixth: (5) That the speed of the Marsha Ann at the time of sighting the Bear was immoderate and unwarranted under the circumstances and constituted negligence.

“(6) That before any steps could be taken to avert or minimize the collision, the Marsha Ann struck the Bear at almost a right angle on the starboard side of the Bear just abaft the deck house.

“Seventh: That District Court erred when it found that at no time prior to the impact did the Marsha Ann take any steps to avoid the collision by reversing her engines, or coming to a complete stop.

“Eighth: The District Court erred when it found:

“(1) That the Marsha Ann was negligent or committed any faults which were the direct and sole cause of the collision and of the alleged damage.

“(2) That the Marsha Ann was moving at an excessive speed at the time of the said collision.

“Sixth: (4) That while so navigating the Marsha Ann appeared from out of the fog broad on the starboard beam of the Bear at a distance of about 40 feet.

“Ninth: (5) That the Bear was observing all of the rules and regulations applicable to a vessel in her situation.

“Tenth: The Bear was not negligent or at fault in any respect contributing to the collision.

“Third: The District Court erred when it did not conclude that the Oil Screw Bear was solely at fault in the said collision.”

It was the testimony of the appellees that the MARSHA ANN was traveling from two to six miles per hour [A. p. 139] at the time of the collision. In evaluating the testimony relative to the speed of the MARSHA ANN, the Court arrived at the following conclusion, which it stated rather tersely as follows at the end of the trial:

“I believed the witnesses when they said that the motors, the engines of the MARSHA ANN were not going at the time of the collision. I came to that conclusion.” [A. p. 572.]

The Court did not make any comment as to the length of time the engines of the MARSHA ANN were stopped. However, since there was no evidence to the contrary, the testimony of the appellants must be accepted, which is to the effect that the engines were so stopped approximately 5 minutes [A. p. 362]. If this be true, then the MARSHA ANN was virtually still in the water and it could not be said that she was speeding. This conclusion is further substantiated by the fact that if the MARSHA ANN, which weighed approximately 360 to 370 tons at the time of the collision [A. pp. 374-5] and had a 3x3 stem iron, was speeding it would have broken the steel band which served as a guard on the BEAR and would have virtually severed the BEAR in half. Surely, it will be admitted that the guard rail above mentioned was bent. However, an examination of the photographs introduced in evidence shows that it was not broken through. It is absolutely inconceivable that a vessel as large and as heavy as the MARSHA ANN would not have completely shorn the said iron band and caused a resultant pie-shaped wound in the hull and superstructure of the BEAR if she was struck with the force claimed.

An examination of the conformation of the wound in the rail on the starboard side of the BEAR shows rather conclusively that the blow, which it received, was not struck at a direct or even approximate 90-degree angle. Had the blow been a straight blow, the wound would have been pie-shaped. Further examination of the photographs of the wound show that they support the contention of the appellees that the BEAR was crossing the bow of the MARSHA ANN at an angle of about 45 degrees and it was close

to the bow of the MARSHA ANN. The skipper made a turn hard to port, thereby swinging the BEAR into the stem of the MARSHA ANN. The BEAR completed its hard to port turn and then reversed its engines and came alongside of the MARSHA ANN. This is substantiated by the testimony of one of the crew members of the BEAR, who testified that after the impact the boat (MARSHA ANN) was portside to the BEAR [A. p. 153], and that the bow of the BEAR was ahead of the bow of the MARSHA ANN [A. p. 153]. If further support for this contention of the appellants is necessary, we may find it in the testimony of Mr. Zankich, the chief radar operator of the MARSHA ANN, who said he thought "somebody had hit us in the side." [A. p. 444.] This testimony is consistent with the fact that the BEAR had swung her starboard side into the bow of the MARSHA ANN at an angle of considerably less than 90 degrees and on the port side of the bow of the MARSHA ANN. Had the blow been a direct blow as indicated by the appellees, Mr. Zankich would have no cause to believe that the impact was on the side of the MARSHA ANN.

Since there is no dispute about the fact that the MARSHA ANN was sounding the proper fog signals at the time of the collision [A. pp. 378, 426, 427] and since there is no dispute that the MARSHA ANN sounded the correct danger signal [A. pp. 380, 430], it is submitted that the MARSHA ANN clearly committed no fault in the premises.

VIII.

The District Court Erred When It Ordered, Adjudged and Decreed:

“That the following libelants, as crew members of the Bear, do have and recover from the Oil Screw MARSHA ANN and from Jack Borcich, Andrew Vili- cich and Bortul Zankich, the amount set down oppo- site their respective names, together with interest thereon from November 30, 1948, at 7% per annum until paid, to wit:

John Ancich	\$918.00
John Kaiza	918.00
Anton Bogdanovich	918.00
Peter Svorinich	918.00
Martin Miskulin	918.00
Ray Zukowski	918.00
William T. Decker.....	918.00
George Korgan	918.00
W. H. Hoopes	418.00
Nick Milosevich	918.00

“The District Court erred when it found:

“Fourth: That the allegations of Article I of the Ancich libel are true.”

The original libel in this case was filed by seven of the crew of the BEAR for damages and maintenance. The es- sence of this libel was for recovery of the crew’s share of the expected but unrealized income from future fishing trips of the BEAR [A. p. 3]. Subsequently an intervening libel was filed by the remainder of the crew for recovery of like damages [A. p. 35]. At the time of trial the ap- pellants objected to the introduction of any evidence on

behalf of the said fishermen on the ground that said libel and intervening libel failed to state a cause of action upon which relief could be granted [A. pp. 98, 99]. On July 18, 1950, the Court ordered *nunc pro tunc* May 31, 1950, that said objection be overruled.

None of the fishermen makes claim for the loss of earning capacity resulting from any personal injury. No such claim could have been made for the only physical injury arising out of the collision in question was to the BEAR herself. The fishermen's claim for damages is that by reason of the collision and detention of the BEAR the fishermen lost the opportunity to fish upon her and therefore participate in a percentage of the income resulting from the catches.

The fishermen are therefore in effect claiming for loss of use or detention. However, such a ground attaches to the *ownership* of a vessel which has suffered damage. See *Potomac*, 105 U. S. 630, 26 L. Ed. 1194 (1881), but it is only the owner's loss of this that is recoverable, *Agwidale v. San Veronico*, 153 F. 2d 869, 1946 A. M. C. 142 (C. C. A. 2d). The fishermen had and claimed no property or interest in the BEAR [A. p. 101] and cannot recover for loss of use or detention.

Any damages suffered by the said fishermen could arise solely by reason of their contract of employment with the owners of the BEAR to fish on the future voyages of the BEAR. Phrased otherwise, any damages suffered by the fishermen were by reason of loss from failure to make future fishing trips on the BEAR during the term of their respective contracts.

At the pre-trial hearing the Trial Court requested the appellants to formulate the question presented by the libel

of the fishermen and at that time the question was formulated substantially as follows:

“Can the fishermen sue for the benefit of a contract with their shipowner which cannot be carried out because of the negligence of a third party who collided with the shipowner’s vessel?”

The law, however, does not afford to these fishermen any remedy against these appellants. The damages claimed are too remote and they cannot be said to have proximately been caused by any act of these appellants. The answer to the above question, therefore, is that the fishermen do not have a cause of action against these appellants. See:

Robbins Dry Dock and Repair Co. v. Flint, 275 U. S. 303, 48 S. Ct. 135, 72 L. Ed. 290 (1927);

Remorquage v. Bennetts, 1 K. B. 243;

The Federal No. 2, 21 F. 2d 313.

It is to be noted that some of the above mentioned cases are admiralty cases and others are common law cases, but in the above instance the rule is the same, to wit: A third person, who by his fault interferes with the performance of a contract or with the expectation of obtaining a contract, cannot be held liable to one of the contracting parties in the absence of malice or intent. See:

Robbins Dry Dock and Repair Co. v. Flint, *supra*.

In that case the propeller of a vessel under time charter was injured and the vessel delayed through the neglect of the operators of the dry dock. The charterer sued the dry dock for loss of use, and, in the lower courts, recovered. That result was reversed in the Supreme Court and all re-

covery denied. Mr. Justice Holmes said at pages 308-309 of that decision:

“The injury to the propeller was no wrong to the respondents (the charterer) but only to those to whom it belonged. But suppose that the respondent’s loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may give rise to a cause of action, *Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See *Savings Bank v. Ward*, 100 U. S. 195. The law does not spread its protection so far. A good statement applicable here, will be found in *Elliott Steam Tug Co., Ltd. v. Shipping Controller* (1922), 1 K. B. 127, 139, 140; *Byrd v. English*, 117 Ga. 191; *The Federal No. 2 (The Glooscap)* 1927 A. M. C. 1471, 21 F. (2d) 313.”

To the same effect see:

Agwilines Inc. v. Eagle Oil and Shipping Co. (Agwidale-San Veronico), 153 F. 2d 869, 1946, A. M. C. 142 (C. C. A. 2d) cert. denied 328 U. S. 835.

In the *Robbins Dry Dock* case Mr. Justice Holmes referred to the following in *Elliott Steam Tug Co. v. Shipping Controller* (1922), K. B. 127, as being “a good statement.”

Scrutton L. J. at pp. 139-140.

“In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. Such a person can not claim for injury done to his contractual rights. . . . The charterer in collision cases does not recover profits, not because the loss of profits during repairs is not the direct consequence of the wrong, but because the common law, rightly or wrongly, does not recognize him as able to sue for such an injury to his merely contractual rights.”

This is not a case like *U. S. v. Laflin* (The Lydia), 24 F. 2d 683 (1928 A. M. C. 700), where an act of Congress included the crew among the possible claimants for damages for seals uncaught on a voyage intentionally and wrongfully interrupted by United States officers, in which case the *owner* was allowed to include the crew's interest with his own recovery under that statute.

This is not a case like *Van Camp Sea Food Company v. DiLeva*, 171 F. 2d 454 (1949 A. M. C. 319), 9th Circuit (1948), where the members of a crew recovered *from their employer* for loss of contract earnings due to layup of their vessel resulting from a collision through the negligent operation of another vessel owned and operated *by the same employer*. However, it was there observed by the Court that an action by the crew could not have been maintained had the offending vessel been owned by “some third party.” In its opinion at page 455 the Court said:

“More particularly (appellant's) contention is that if the GLORIA R had been owned by some third party, the appellant, as owner of the Bessemer, would have had the *sole right* to sue the GLORIA R's owner for the

GLORIA R's wrong doing. This latter contention respecting separately owned vessels is the law of this circuit and generally of the admiralty as stated by this court in a case relied upon by appellant, *United States v. Laflin*, 9 Cir., 24 F. 2d 683, reported also as *The LYDIA*, 1928 A. M. C. 700, and cases therein cited." (Emphasis added.)

Surely there is great reason for holding of the *Robbins* case and other related cases which preclude a cause of action in a case such as this against the negligent tortfeasor. Firstly, a tortfeasor must be held to the damages proximately caused by his act; that is, damages which are reasonably foreseeable. Charged by this standard it cannot be said, and the courts do not so hold, that a tortfeasor must foresee that all persons whose property he may injure have a contract of employment with other persons and that these other persons will be deprived of this contract right. Secondly, to permit recovery against such a tortfeasor would open the door to all sorts of chicanery and fraud between the party whose property was damaged and the claiming parties who could quite easily and simply fabricate the contract right between them.

To further illustrate that the position of the libelants is untenable, let us suppose that one of the huge Matson liners was damaged by a negligent tortfeasor. Can it be seriously contended that each of the seamen or other employees aboard that vessel could maintain a cause of action against the said negligent tortfeasor for future wages which would accrue under their respective contracts of employment? The answer must be in the negative and the libelants have not been able to cite a case to the contrary.

The issues raised by the libel of the fishermen in no way involve the question whether or not the *owners* of the BEAR might have recovered against any or all of these appellants, or if so whether the owners might have recovered not only for their own loss of use as owners, but also for any loss of wages or the like suffered by the fishermen. In any event, it cannot be too forcefully stressed that a right in the master or owner of the injured vessel to sue for prospective catches *does not* give the fishermen an equal and co-existing right to sue for such catches. Any cause of action which the fishermen have must *be theirs by virtue of their own right and not by virtue of the right which exists in the owner*. The attention of the Court is called to the following language on page 309 of *Robbins Dry Dock & Repair Co. v. Flint, supra*:

“The decision of the Circuit Court of Appeals seems to have been influenced by the consideration that if the whole loss occasioned by keeping a vessel out of use were recovered and divided a part would go to the respondents. It seems to have been thought that perhaps the whole might have been recovered by the owners, that in the event the owners would have been trustees for the respondents to the extent of the respondents’ share, and that no injustice would be done to allow the respondents to recover their share by direct suit. *But justice does not* permit that the petitioner be charged with the full value of the loss of use unless there is some one who has a claim to it *as against* the petitioner. *The respondents have no claim either in contract or in tort, and they cannot get a*

standing by the suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents.”

From the foregoing together with the cases and authorities cited herein, it is clear that the fishermen have no cause of action against these appellants under the law as it now exists. To hold otherwise would be to legislate into existence such a broad concept of liability for negligent acts that the present rule permitting the recovery from a negligent tortfeasor of damages which proximately result from his tortious acts, would be completely abrogated and a negligent tortfeasor would be liable for *all* damages resulting from his negligent act whether the said damages were proximate or remote.

Attention is further directed to the fact that the trial court awarded damages to libelants Ray Zukowski and William T. Decker although no evidence whatsoever was introduced for or on behalf of either of these libelants proving or even tending to prove that they were damaged in any manner whatsoever. The said libelants did not appear to testify for themselves and there was no other competent evidence to support the allegations of their respective libels which were denied by these appellants. It is clear, therefore, that the Court gratuitously undertook to render a judgment for damages in favor of these libelants without the benefit of any evidence to support such a judgment.

Conclusion.

In view of the foregoing, appellants contend that the MARSHA ANN was not at fault in the premises. However, regardless of the propriety of the navigation of the MARSHA ANN, it is submitted that the flagrant faults committed by the BEAR point unerringly to the conclusion that these faults, if not the sole cause of said collision, certainly contributed to the happening of this collision and the owners of the BEAR should be held mutually liable for the damages arising therefrom.

Furthermore it is the contention of appellants that the libel of the fishermen appellees failed to state facts sufficient to constitute a claim against these appellants.

For the reasons hereinabove stated, it is respectfully submitted that the Trial Court erred in the various particulars herein outlined and for said reasons the judgment should be reversed.

Respectfully submitted,

TRIPP & CALLAWAY,

By HULEN C. CALLAWAY,

Attorneys for Appellants.

11

E

A

Z

n

1

APPENDIX.

Assignments of Errors Relied Upon by Appellants.

“First: The District Court erred when it ordered, adjudged and decreed:

“That the following libelants, as crew members of the Bear, do have and recover from the Oil Screw MARSHA ANN and from Jack Borcich, Andrew Vilicich and Bortul Zankich, the amount set down opposite their respective names, together with interest thereon from November 30, 1948, at 7% per annum until paid, to wit:

John Ancich	\$918.00
John Kaiza	918.00
Anton Bogdonovich	918.00
Peter Svorinich	918.00
Martin Miskulin	918.00
Ray Zukowski	918.00
William T. Decker	918.00
George Korgan	918.00
W. H. Hoopes	418.00
Nick Milosevich	918.00

“That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann, and from Jack Borcich, Andrew Vilicich and Bortul Zankich, in respect of the damages to the Bear, the sum of \$14,678.61, together with interest from November 30, 1948, at 7% per annum on the amount of \$14,170.67 until paid.

“That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich in respect of the loss of use of the Bear the sum

of \$4,320.00, together with interest thereon at 7% per annum from November 30, 1948, until paid.

“That libelants and intervening libelants do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich, their costs of suit herein incurred.

“Third: The District Court erred when it did not conclude that the Oil Screw Bear was solely at fault in the said collision.

“Fourth: The District Court erred when it found that the allegations of Article I of the Ancich libel are true.

“Sixth: The District Court erred when it found:

“(1) That at the time of the said collision the Bear was proceeding at a speed of about 1 to 1½ miles per hour.

“(2) That at the time of the said collision and for more than an hour preceding the same the Bear was sounding fog signals in compliance with the applicable Rules of the Road.

“(3) That the Bear alternately stopped and proceeded with caution at a speed of approximately 1½ miles per hour upon hearing whistles in the vicinity.

“(4) That while so navigating the Marsha Ann appeared from out of the fog broad on the starboard beam of the Bear at a distance of about 40 feet.

“(5) That the speed of the Marsha Ann at the time of sighting the Bear was immoderate and unwarranted under the circumstances and constituted negligence.

“(6) That before any steps could be taken to avert or minimize the collision, the Marsha Ann struck the Bear at

almost a right angle on the starboard side of the Bear just abaft the deck house.

“(7) That at the time of the said collision the Bear was virtually dead in the water.

“Seventh: That District Court erred when it found that at no time prior to the impact did the Marsha Ann take any steps to avoid the collision by reversing her engines, or coming to a complete stop.

“Eighth: The District Court erred when it found:

“(1) That the Marsha Ann was negligent or committed any faults which were the direct and sole cause of the collision and of the alleged damage.

“(2) That the Marsha Ann was moving at an excessive speed at the time of the said collision.

“Ninth: The District Court erred when it found:

“(2) That the Bear was manned by a competent crew.

“(3) That the Bear was well and carefully navigated.

“(4) That the Bear was maintaining a proper and efficient lookout.

“(5) That the Bear was observing all of the rules and regulations applicable to a vessel in her situation.

“Tenth: The District Court erred when it found that the Bear was not negligent or at fault in any respect contributing to the collision.

“Eleventh: The District Court erred when it found:

“(3) That the Bear was not traveling at an excessive speed under all the circumstances.

“(4) That the Bear was stopping her engines and navigating with caution.

“(6) That under the circumstances of this case, Article 19 of the International Rules does not apply.

“(7) That the position of the lookout on the Bear on the open bridge was reasonable and proper under all the circumstances of the case.

“(8) That the position of the Bear’s lookout did not contribute to the collision; that it would have happened regardless of where the lookout was stationed.

“Twelfth: The District Court erred when it found:

“(2) That the period of 38 days was a reasonable lay-up time for bids and repairs to the Bear.”

No. 12761
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JACK BORCICH, ANDREW VILICICH and BORTUL ZANKICH, co-owners of the Oil Screw MARSHA ANN,
Appellants,

vs.

JOSEPH ANCICH, JOHN KAIZA, ANTON BOGDANOVICH, PETER SVORINICH, MARTIN MISKULIAN, RAY ZUKOWSKI, WILLIAM T. DECKER, GEORGE KORGAN, W. H. HOOPES, NICK MILOSEVICH, and SAM BILAS,
Appellees.

APPELLANTS' REPLY BRIEF.

TRIPP & CALLAWAY,
HULEN C. CALLAWAY,
935 Van Nuys Building,
Los Angeles 14, California,
Attorneys for Appellants.

TOPICAL INDEX.

PAGE

The appellees have failed to show that the trial court did not
err in the various particulars assigned by appellants..... 1

Conclusion 13

TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Barry-Medford, 65 Fed. Supp. 622.....	4
Australia Star-Hindoo, 74 Fed. Supp. 145.....	4
Hayes, et al. v. Luckenbach S. S. Co., et al., 92 Fed. Supp. 684..	11
Robbins Dry Dock & Repair Co. v. Flint, 275 U. S. 303, 48 S. Ct. 135, 72 L. Ed. 290.....	12
United States v. Laflin, 24 F. 2d 683.....	11

STATUTES

International Rules for the Prevention of Collisions at Sea, Art. 16	2
International Rules for the Prevention of Collisions at Sea, Art. 19	2

No. 12761

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BORCICH, ANDREW VILICICH and BORTUL ZANKICH, co-owners of the Oil Screw MARSHA ANN,
Appellants,

vs.

JOSEPH ANCICH, JOHN KAIZA, ANTON BOGDANOVICH, PETER SVORINICH, MARTIN MISKULIAN, RAY ZUKOWSKI, WILLIAM T. DECKER, GEORGE KORGAN, W. H. HOOPES, NICK MILOSEVICH, and SAM BILAS,
Appellees.

APPELLANTS' REPLY BRIEF.

The Appellees Have Failed to Show That the Trial Court Did Not Err in the Various Particulars Assigned by Appellants.

Appellees have attempted to justify and protect the decision of the trial court and have been unable so to do. A step by step analysis of the contentions of the appellees as set down in their brief clearly shows that there can be no justification or explanation for the errors committed by the trial court. For example:

1. On pages 5 to 7 of their brief appellees contend that the starboard hand rule applies only to vessels which are in sight of each other and can continually check each

other's position. Appellees further contend that this rule would directly conflict with Article 16 of the International Rules for the Prevention of Collisions at Sea because it provides that a vessel "hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

In fact, a close analysis of Articles 16 and 19 show that they are complementary and do not conflict in the slightest. Article 16 purports to cover only those cases where the fog signals heard by any given vessel are coming from another "vessel the position of which is not ascertained." Once the position of the vessel sounding the signals is ascertained there is no necessity for Article 16 to apply and Article 19 then applies. To contend otherwise would be to leave two vessels meeting on the high seas in a fog without guidance from the International Rules except for the admonition that they each "navigate with caution." But how are the vessels to govern themselves once each has ascertained the position of the other? As already pointed out on page 32 of appellants' opening brief unless there is a uniform rule governing the actions of such vessels neither vessel could safely move on its course again without danger. Manifestly, therefore, the starboard hand rule must be applied even in fog, at least where it is shown that the vessels had sighted each other. Here, the BEAR, the burdened vessel had sighted the privileged vessel, the MARSHA ANN, 10 seconds before the collision and had ample opportunity to keep clear of the MARSHA ANN since the testimony of its own crew was to the effect that the engines of the BEAR could take hold in reverse in less than half the time which elapsed between the time

that the MARSHA ANN was sighted and the time of the collision.

In brief, we agree with appellees when they say "the import of Article 16 is well known to the courts, admiralty proctors and mariners." (Appellees' Br. p. 7.) Appellants merely wish to go on to say that it is also well known to the courts, admiralty proctors and mariners that all complementary rules of the road should be heeded when applicable. As already shown above, to avoid an impasse two vessels finding themselves in a situation similar to the one at hand must resort to Article 19 to safely proceed on their respective courses.

2. On page 7 of their reply brief appellees insist that the MARSHA ANN did not make proper use of her radar, even though they admit on page 8 of their brief that the radar operator attended his duties diligently. The appellees support their contention in this regard with the dramatic and inaccurate statement to the effect that "the MARSHA ANN literally shut her eyes and stood into the jaws of a collision." (Appellees' Br. p. 8.)

It is uncontradicted that the radar set of the MARSHA ANN was "blind" within the minimum 200 yard radar range. Once the BEAR had come within this "blind" spot, the MARSHA ANN was absolutely and completely as devoid of radar "eyesight" as would be any vessel not equipped with radar. Are not appellees in effect trying to say "The MARSHA ANN had radar, therefore it was liable for the collision even though its radar was absolutely ineffective within a range of 600 feet"? Clearly, this is a ridiculous contention on its face when it is realized that a vessel such as the BEAR, only 68 feet in length could change its course scores of times from the instant it

vanished off the radar screen of the MARSHA ANN, 600 feet away, and the time it came into actual collision with the MARSHA ANN. And certainly the erratic whistle blowing of the BEAR would not have a tendency to indicate its course to any surrounding vessels.

A study of the "radar cases" cited by the appellees on the aforesaid pages 8 to 10 of their brief shows that these cases are not in point and are not in any manner determinative in the instant case for the following reasons: In the *Barry-Medford*, 65 Fed. Supp. 622, the offending vessel had absolutely failed to even use her radar. In the case of the *Australia Star-Hindoo*, 74 Fed. Supp. 145, we find that the offending vessel had utterly failed to make any determined or systematic readings. In brief, a summary of these two cases indicates that the offending vessel had not in either case used her radar properly. Now let us look at the instant case, where we find that the MARSHA ANN had made proper use of her radar by frequent and constant readings and in fact had "sight" of the BEAR at all times until she came within the 200 yard "blind spot" of the MARSHA ANN's radar. How could the MARSHA ANN more properly use her radar?

3. On page 11 of their brief appellees maintain that appellants "lifted two sentences from Judge Carter's remarks at the end of the trial as a basis for building an argument that the MARSHA ANN was dead in the water when the collision occurred." Appellees go on to quote from Judge Carter's remarks as follows:

"I think that the motors of the MARSHA ANN were not turning at the time of the collision. However, I think the MARSHA ANN at the time of the collision

was sliding through the water fast enough to constitute negligence on the part of the MARSHA ANN, together with all the other circumstances of the case.”

Though appellees lean heavily upon Judge Carter’s statement above quoted, to the effect that the MARSHA ANN “was sliding through the water fast enough to constitute negligence,” they utterly fail to quote the reasoning of Judge Carter which lead him to such a decision. His reasoning was as follows:

“First of all you have got a situation where the MARSHA ANN had come up the coast without any fog, gone into the harbor and discharged her fish. She had then started to proceed out of the harbor, and the first fog was encountered before she got to the light within the harbor.

“On the other hand, the BEAR had hit fog earlier, had hit fog off of Seal Beach, probably, and had been fighting its way through the fog for some time before the collision.

“I have driven an automobile in fog, and so have you, and I know it is a matter of common experience when you hit fog, and the fog begins to get heavier, your first tendency is to bowl on through it, and the farther you get into the fog the more difficult it becomes to drive, and you wind up creeping in the fog. There is nothing in the record, probably, on that particular point, but my conclusion is that the MARSHA ANN, having hit the fog for the first time inside the harbor, the fog began to thicken up, probably by the time she got to the light it began to get heavier, the MARSHA ANN’s tendency was to cut her speed as she proceeded but she had for the first time come in contact with fog.” [A. 573, 574.] (Italics added.)

Appellants will make no effort whatsoever to discuss the merit of the rationale of the court since the fallacy is self evident, but appellants will agree with the trial court when it states that there is nothing in the record to show that the MARSHA ANN was proceeding at an excessive speed at the time of the collision. Furthermore, if the MARSHA ANN "a vessel some six times heavier than the BEAR" struck the BEAR at the speed claimed by appellees the BEAR would have been practically severed in two parts. However, as the photographs introduced in evidence clearly show, the steel band encircling the BEAR was not even broken through.

4. On page 12 of their brief appellees speak of the "pivoting point" of the BEAR. They reason that normally the pivot point is slightly forward of amidships and if the vessel is down by the stern the pivot point moves aft. They further go on to say that since the BEAR was returning with a load of fish, she "would" be down by the stern hence her pivot point would be aft and there would not be any swing amidships where the MARSHA ANN purportedly hit the BEAR. This whole discussion on the part of appellees is clearly gratuitous and has no place even in an argument for the reason that there was absolutely no evidence whatsoever introduced by appellees at the time of trial to show where the pivot point of the BEAR was, either loaded or unloaded. Therefore, there is no evidence in the record of any kind relative to the maneuverability of the BEAR to offset the claim of appellants that the BEAR could, and in fact did, pivot into the stem of the MARSHA ANN. Furthermore, reference to the photographs in evidence showing the bow of the MARSHA ANN indicates a bending of the stem of the MARSHA ANN to the starboard

which is consistent with the claims of the appellants. If the blow was struck in the manner contended by appellees, the stem of the MARSHA ANN would have been bent straight in. Briefly the physical make-up of the wound in the BEAR and the damage to the stem of the MARSHA ANN indicate quite clearly that the BEAR had swung into the bow of the MARSHA ANN.

5. Appellees insist on page 13 of their brief that the erratic and inconsistent fog signals of the BEAR did not contribute to the collision. In fact, on page 16 of their brief they even try to show that the signals of the BEAR were proper. An examination of the cases and authorities cited by appellees shows that the particular vessel therein referred to was "sounding proper signals, while navigating in Long Island sound." (Appellees' Br. p. 16.) Certainly, it will be admitted by appellants that if proper signals were being given, their frequency might not jeopardize surrounding vessels. However, where, as here, the offending vessel was indiscriminately sounding fog signals without any regard to their meaning, it can only be said that the frequency of such signals would tend to confuse, rather than aid, surrounding vessels. Appellants will not further extend their discussion of this point but refer the court to the argument found on pages 17 to 22 of their opening brief.

6. On page 17 of their brief appellees state:

"Appellants also state: 'The District Court erred when it found: Sixth: (1) That at the time of the said collision the BEAR was proceeding at a speed of about one to one and one-half miles per hour.' (Br. 23.) We believe that appellants' paraphrasing of the court's finding is not accurate."

To correct appellees' error appellants will quote verbatim the finding of the court which was not paraphrased by appellants. The finding is set out on page 62 of the apostles as follows:

"The Court finds that the facts pertinent to said collision are as follows: *The BEAR was proceeding at a speed of about 1½ miles per hour in a general north-westerly direction toward and about 2 miles southeast of the Los Angeles Harbor Breakwater Light.*" (Italics added.)

7. On page 17 of their brief appellees maintain that the argument of appellants relative to the excessive speed of the BEAR was based upon computations which in turn were based on the time and point of departure of the BEAR earlier on the morning of the collision from the fishing grounds off Oceanside, California. Appellees go on to say "None of these factors are accurately known." This is, indeed, an amazing statement when it is realized that all of the evidence relating to the time and point of departure of the BEAR was taken from testimony of the crew of the BEAR. [A. pp. 102, 192.]

To further support their position that the BEAR was not speeding at the time of the collision, the appellees refer to the testimony of their crew to the effect that immediately prior to the collision the BEAR was "alternately stopping and then proceeding with caution at a speed of approximately 1½ knots." (Appellees' Br. p. 18.) But how does such a contention have any merit in the face of the testimony of the Captain of the BEAR who testified that the BEAR would negotiate 2½ miles to the jetty in 20 minutes [A. p. 241, Appellants' Op. Br. p. 25.] To travel such a distance in 20 minutes the BEAR clearly was moving at a speed of approximately 7½ miles per hour. As already

brought out on page 24 of the opening brief of appellants, Captain Milosevich, upon examination by his own proctor, testified that in the dense fog prevailing at the time in question the BEAR expected to negotiate a certain distance in 35 or 40 minutes. [A. p. 241.] That distance was approximately 7 or 8 miles according to the same witnesses' testimony [A. p. 206] and the speed at which the said Captain expected to proceed was $8\frac{1}{2}$ miles per hour. [A. p. 207.]

Surely, this testimony of the Captain of the BEAR by itself is sufficient to prove that the trial court erred when it found that the BEAR was not proceeding at an excessive speed immediately prior to, and at the time of, the collision.

8. On pages 18 to 20 of their brief appellees attempt to show that they had five men on the open bridge and one man standing on deck on the starboard side who were looking and saw the MARSHA ANN. The facts, of course, are otherwise. Only Captain Milosevich, Mr. Ancich (the cook) and Mr. Miskulian were in the pilot house of the BEAR. [A. pp. 146, 214.] Mr. Bogdanovich was standing "under the green light" [A. p. 286] and testified that "part of it was my own will to go up there on a lookout." [A. p. 285.] Mr. Hoopes, the engineer of the BEAR, was also standing "under the green sidelights." [A. p. 136.] He was not acting as a lookout but was merely "looking out the same as anybody else would." [A. p. 136.]

It is clear from the testimony of these crew members of the BEAR that nobody was designated as a lookout of the BEAR. On page 20 of their brief appellees contend that these persons who were topside on the BEAR were efficient because of the fact they purportedly "picked up the MARSHA ANN at 50 to 60 feet, the maximum visibility." The

credibility of Captain Milosevich and two other members of the crew of the BEAR to wit: Mr. Ancich and Mr. Bogdanovich is, however, seriously questioned by their own testimony to the effect that they saw the bow of the MARSHA ANN at 50-60 feet (the maximum visibility) and at one and the same time, saw the pilot house of the MARSHA ANN [A. pp. 232, 283, 298] which is considerably aft of the bow of the MARSHA ANN. In short, appellees want us to believe that these three witnesses could see well beyond the maximum visibility range to which they testified.

9. Appellees totally fail to justify the excessive damages awarded for the injuries to the BEAR. They rely completely on the fact that the MARSHA ANN “a vessel some six times heavier than the BEAR” (Appellees’ Br. p. 22) struck the BEAR “a crushing broadside blow.” (Appellees’ Br. p. 22.) From this they reason that the damages were not excessive. However, as already shown above, if the MARSHA ANN had been proceeding at the speed claimed by appellees and struck the blow claimed by appellees the BEAR would have been literally torn in half.

Appellants will readily agree with its surveyors that damages resulting from a collision may be, to some extent, a matter of opinion. However, it is seriously questioned whether two surveyors could disagree as to the amount of damages by about \$10,000.00 to \$12,000.00. When one reflects upon the experience and background of the respective surveyors, he is lead unerringly to the conclusion that the disparity between the estimates made by the respective surveyors clearly is not one attributable to the

variance of expert opinion but rather to the fact that such damage was not caused by the collision.

10. In support of their contention that the fishermen appellees had a cause of action for the loss of anticipated profits the appellees rely almost completely upon the decision handed down by Judge Carter and indeed they quote at length from the said decision. (Appellees' Br. pp. 28 to 30.) An analysis of Judge Carters decision and the contentions of the appellees shows that they have erred in various particulars in an attempt to judicially legislate into existence a cause of action for the fishermen.

On page 30 appellees quote Judge Carter as follows: "They (the fishermen) have no right of recovery against their Master or the owner of a boat unless he be at fault . . . to refuse them the right to sue in their own names, places them at the whim and caprice of their employer and may involve conflicting interests." On the other hand, appellees on page 31 of their brief quote from *U. S. v. Laflin*, 24 F. 2d 683, wherein it is said that the fishermen "might sue him (the owner) for damages if he neglected to prosecute the same (an action on behalf of the crew)."

On June 12, 1950, Judge McCarthy of the United States District Court for the District of Massachusetts rendered an opinion in a case which is exactly "on all fours" with the case at hand. The case was *Hayes, et al. v. Luckenbach S. S. Co., et al.*, 92 Fed. Supp. 684. There the libelants were the captain and members of the crew of the trawler LUCKY STAR. The libel alleged that the LUCKY STAR was lying made fast at a usual and proper berth at the Boston

Fish Pier; that the LYNCHBURG VICTORY while being towed by the ARES and SATURN struck the LUCKY STAR on her starboard side and crushed her against the Fish Pier causing serious damage to the LUCKY STAR.

All respondents filed exceptions to the libel on the ground that the facts averred in the libel were insufficient and did not constitute a cause of action against the respondents within the Admiralty and Maritime jurisdiction of the court.

The court discussed the various cases cited by the appellees in their brief herein together with the decision of *Van Camp Sea Food Co. v. DiLeva*, *supra*, and sustained the exceptions to the libel and dismissed same.

It is admitted by appellees (Appellees' Br. p. 3) that the trial court asked for "cases or a *theory* under which the seamen or fishermen could recover." [A. p. 577.] (Italics added.) The appellees were unable to find any case to sustain recovery for the fishermen. The decision of the trial court rests upon "a *theory*" to the effect that the fishermen are "the real parties in interest in such an action as this, and as such should be the parties to bring the libel." [A. p. 59.] But how can the fishermen be the real parties in interest to a cause of action which they do not have? The Supreme Court of the United States stated this same thought as follows:

"The respondents have no claim either in contract or in tort, and they cannot get a standing by the suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents." (Italics added.) *Robbins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303, 48 S. Ct. 135, 72 L. Ed. 290 (1927) at page 309.

Conclusion.

It is apparent from the foregoing that the appellees have failed to show that the court did not err in the various particulars assigned by the appellants in their opening brief. On the other hand, appellants have demonstrated herein and in their opening brief that the trial court erred grievously.

It is respectfully submitted that the judgment of the trial court be reversed.

Respectfully submitted,

TRIPP & CALLAWAY,

HULEN C. CALLAWAY,

Attorneys for Appellants.

No. 12761.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BORCICH, ANDREW VILICICH and BORTUL ZANKICH, Co-Owners of the Oil Screw MARSHA ANN,

Appellants,

vs.

JOSEPH ANCICH, JOHN KAIZA, ANTON BOGDANOVICH, PETER SVORINICH, MARTIN MISKULIAN, RAY ZUKOWSKI, WILLIAM T. DECKER, W. H. HOOPES, NICK MILOSEVICH, GEORGE KORGAN and SAM BILAS,

Appellees.

Appeal from the United States District Court for the
Southern District of California
Central Division

BRIEF FOR APPELLEES.

DAVID A. FALL,

EKDALE AND SHALLENBERGER,
GORDON P. SHALLENBERGER, and

LILLICK, GEARY & MCHOSE,
WILLIAM A. C. ROETHKE,
LAWRENCE D. BRADLEY, JR.,

1100 Banks-Huntley Building,
Los Angeles 14, California,

Proctors for Appellees.

TOPICAL INDEX

	PAGE
Statement of jurisdiction.....	1
Statement of the case.....	2
Summary of argument.....	3
Argument	5

I.

The Starboard Hand Rule, or Article 19 of International Rules for the Prevention of Collisions at Sea, 33 U. S. C. A. 104, applies only to vessels which are in sight of each other and can continually check each other's position....	5
---	---

II.

The faults of the Marsha Ann were plain, flagrant and inexcusable; and were the sole and only cause of the collision....	7
A. The Marsha Ann did not make proper use of her radar	7
B. The Marsha Ann's speed at the time of sighting the Bear was excessive and unwarranted.....	11
C. The Marsha Ann was not sounding the proper fog signals and she did not sound the "correct" danger signal	13

III.

The alleged faults of the Bear are not established or supported by the record.....	14
A. The Bear had a proper and efficient whistle and was sounding the proper fog signals.....	15
B. The Bear was proceeding at a moderate speed with due regard to existing conditions and circumstances.....	17
C. The Bear was maintaining a proper and efficient lookout	18
D. The Bear alternately stopped and proceeded with caution upon hearing whistles in the vicinity.....	20

IV.

The damages awarded appellees were reasonable, and certainly not excessive.....	21
---	----

V.

The trial court properly awarded damages to the fishermen for the loss of their prospective share in the fish catch.....	22
A. Finding of damages for fishermen is sustained by the evidence and stipulations.....	22
B. Fishermen may maintain an action for wages without prepayment of costs.....	25
C. The fishermen have a cause of action for loss of anticipated wages	26
Conclusion	33

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Barry v. Medford, 65 Fed. Supp. 622.....	8
Baxter v. Rodman, 3 Pick. 435.....	32
Blake v. W. R. Chamberlin & Co., 176 F. 2d 511.....	15
Cekalovich v. Ruljanovich, 142 F. 2d 430.....	25
Compania Naviera Limitada v. Black, 183 F. 2d 388.....	15
Erie R. Co. v. The Invader, 159 F. 2d 648.....	6
Grant v. U. S. S. B. E. F., 24 F. 2d 812.....	26
Grozier v. Atwood, 4 Pick. 234.....	32
Hindoo-Australian Star, 74 Fed. Supp. 145; affd., 172 F. 2d 472	10
Lind v. United States, 156 F. 2d 231.....	6, 28
Publicover v. Alcoa S. S. Co., 168 F. 2d 672.....	6
Rice v. United States, 168 F. 2d 219.....	19
Robins Dry Dock & Repair Co. v. Flint, 275 U. S. 303, 48 S. Ct. 135, 72 L. Ed. 290.....	26
Smyth, C. I. R. v. Barneson, 181 F. 2d 143.....	15
Taber v. Jenny, Fed. Cas. No. 13720.....	32
The Anglo-Saxon Petroleum Co. v. United States, 88 Fed. Supp. 158	6
The Grenadier, 74 Fed. 974.....	6
The Quivilly, 253 Fed. 415.....	16
The Sagamore, 247 Fed. 743.....	18
The Tillicum, 230 Fed. 415.....	19
United States v. Cornell Steamboat Co., 202 U. S. 184, 26 S. Ct. 648, 50 L. Ed. 987.....	29
United States v. Laffin, 24 F. 2d 683.....	31, 32
United States v. The Australian Star, 171 F. 2d 472.....	6
Van Camp Sea Food Co. v. Di Leva, 171 F. 2d 454.....	27, 28, 29
Watts v. Camors, 115 U. S. 353, 6 S. Ct. 91, 29 L. Ed. 406....	29
Wilmington Transp. Co. v. Edwards, 95 F. 2d 283.....	14, 19

iv.

STATUTES

PAGE

Federal Rules of Civil Procedure, Rule 52(a).....	15
International Rules for the Prevention of Collisions at Sea, Art. 15(b)	13
International Rules for the Prevention of Collisions at Sea, Rule 16	20
International Rules for the Prevention of Collisions at Sea, Art. 29	10
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1333.....	2
United States Code, Title 28, Sec. 1916.....	4, 25, 26
United States Constitution, Art. III, Sec. 2.....	1

TEXTBOOKS

Benedict on Admiralty (6th Ed.), Sec. 223.....	29
Benedict on Admiralty (6th Ed.), Sec. 621.....	29
Farwell, The Rules of the Nautical Road (2d Ed., 1944), pp. 59, 81	13
Farwell, The Rules of the Nautical Road (2d Ed., 1944), p. 198	16
Griffith on Collision (1949), pp. 222, 342.....	13
Griffith on Collision (1949), pp. 284-86.....	19
Griffith on Collision (1949), p. 328.....	5

No. 12761.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BORCICH, ANDREW VILICICH and BORTUL ZANKICH, Co-Owners of the Oil Screw MARSHA ANN,
Appellants,

vs.

JOSEPH ANCICH, JOHN KAIZA, ANTON BOGDANOVICH, PETER SVORINICH, MARTIN MISKULIAN, RAY ZUKOWSKI, WILLIAM T. DECKER, W. H. HOOPES, NICK MILOSEVICH, GEORGE KORGAN and SAM BILAS,
Appellees.

Appeal from the United States District Court for the
Southern District of California
Central Division

BRIEF FOR APPELLEES.

*To the Honorable, the Chief Judge and Associate Judges
of the United States Court of Appeals for the Ninth
Circuit:*

Statement of Jurisdiction.

This action was brought by appellees to recover for damages arising out of a collision on the high seas between the Oil Screw BEAR and the Oil Screw MARSHA ANN. Jurisdiction was conferred on the District Court by the grant of admiralty jurisdiction contained in the Constitution of the United States, Article III, Section 2,

and by Title 28, U. S. C., Section 1333, which gives the District Courts original jurisdiction over any civil cause of admiralty or maritime jurisdiction.

Judgment was entered September 14, 1950. Within 90 days and on October 26, 1950, a petition for appeal was filed pursuant to the provisions of 28 U. S. C., Section 1291, and the applicable rules of admiralty procedure as promulgated by the United States Supreme Court. [A. 72.] The appeal was allowed. [A. 72.]

Statement of the Case.

We strongly controvert appellants' summaries of testimony commencing on pages 4 and 9 of their opening brief. Appellants have lifted statements from context and have plainly used the summaries for argumentative purposes. We do not intend to answer at this point the many misrepresentations of fact and we reserve our answers for the argument which follows.

Insofar as the respective versions of appellees and appellants, which are set out at page 3 of appellants' brief, illustrate the sharply conflicting contentions of the parties, they serve their purpose. We point out that the testimony of the respective witnesses for appellees and appellants was equally conflicting.

We would like to add that this case came to trial before the Honorable James M. Carter on November 8, 9, 13, 14, and 19, 1949. It was tried without a jury and all witnesses testified in court. At the conclusion of the trial, Judge Carter found negligence on the part of the MARSHA ANN. [A. 573.] The rest of the issues were taken under submission. Judge Carter announced that he would welcome briefs discussing three points: (1) Was the BEAR guilty of any fault proximately contributing to the colli-

sion? (2) The amount of damage to the BEAR. (3) Cases or a theory under which the seamen or fishermen could recover. [A. 577.] Briefs were submitted and on May 31, 1950, Judge Carter handed down his memorandum of decision. He found in favor of appellees and against appellants on all issues taken under submission. [A. 45.] In addition, Judge Carter wrote an opinion on the right of fishermen employed on a lay plan to maintain a libel *in rem* and *in personam* in their own names against a vessel which negligently collided with a vessel on which they were employed thereby causing them to lose their share of a prospective catch of fish on that vessel. [A. 49.] This opinion was filed July 18, 1950, and was reported in 92 Fed. Supp. 929 and 1950 A. M. C. 1336.

Summary of Argument.

Appellees' argument will be briefly summarized. However, first we want to emphasize the importance of keeping in mind all the circumstances and special facts relating to this collision. Discussion of individual points in the abstract is useless and can be very misleading.

There is only one question regarding the rules to apply to this collision—does the Starboard Hand Rule apply to vessels which are not in sight of each other? Recent cases unanimously hold that it does not. Also, there is a very strong reason why it should not apply. Fog navigation demands that *both* vessels act to avoid each other.

The two decisive factors in this collision were: (1) the MARSHA ANN's improper use of radar, and (2) the MARSHA ANN's excessive speed. The MARSHA ANN was proceeding at excessive speed out of Los Angeles Harbor in a dense fog. At the time of the collision, she was just outside the harbor breakwater. Her radar gave

her a very clear picture of the vessels in her vicinity, including the BEAR. Notwithstanding this information, the MARSHA ANN literally shut her eyes and stood into the jaws of a collision. That is, she knowingly entered the blind area where her radar would not pick up the BEAR. The physical damage sustained by the BEAR emphatically speaks, and is uncontradictable evidence of the MARSHA ANN's speed.

The seamanlike navigation of the BEAR stands up under close and critical scrutiny. She had a proper and efficient whistle and was sounding the proper fog signals. As she felt her way through the fog, she alternately stopped and proceeded with caution upon hearing whistles of other vessels in the vicinity. She was proceeding at a moderate speed and maintaining a proper and efficient lookout with due regard to existing conditions and circumstances. The BEAR was operated in all respects in strict compliance with the International Rules for the Prevention of Collisions at Sea. Her maneuvers in no way contributed or were related to the collision. When the MARSHA ANN emerged at excessive speed from the fog headed directly for the BEAR, there was absolutely nothing that the BEAR could do to escape.

The damages proximately resulting from the collision and the lay time were exhaustively discussed and thoroughly reviewed by the trial court. Judge Carter's award was reasonable in every respect and was amply supported by the record.

The cause of action brought by the fishermen is contemplated by Title 28 U. S. C., Section 1916. This cause of action sounds in tort and not contract, either expressed or implied, as appellees' claim. It is simply an action for damages which were foreseeable and resulted from the negligent acts of appellants.

ARGUMENT.

I.

The Starboard Hand Rule, or Article 19 of International Rules for the Prevention of Collisions at Sea, 33 U. S. C. A. 104, Applies Only to Vessels Which Are in Sight of Each Other and Can Continually Check Each Other's Position.

Before considering the factual questions raised by this appeal, let us first determine whether or not the Starboard Hand Rule applies. All the testimony is to the effect that both vessels were enveloped in a dense fog—visibility was not over 50 or 60 feet. [A. 137, 171, 361, 379, 510.] As we understand appellants' position, they contend that Article 19 applies notwithstanding the fact that the vessels were not in sight of each other. (Br. 31.) Certainly no one would argue that anything but an *in extremis* situation existed when the BEAR and the MARSHA ANN came out of the fog and sighted one another at a distance of 20 to 50 feet.

Appellants cite four cases for the proposition that the Starboard Hand Rule applies to vessels navigating in a fog. (Br. 31.) In his book on *Collision*, 1949, p. 328, John Wheeler Griffin, an eminent Proctor in Admiralty, refers to these four cases as, "clearly wrong on principle."

It is true that at the time these cases were decided, the dates run from 1885 to 1903, there was some confusion on the point. However, the confusion that once existed has since been clarified. Appellants' counsel apparently has overlooked the more recent cases which have uni-

formly held that the Starboard Hand Rule does not apply to vessels not in sight of one another.

United States v. The Australian Star, 171 F. 2d 472 (2d Cir., 1949);

Publicover v. Alcoa S. S. Co., 168 F. 2d 672 (2d Cir., 1948);

Erie R. Co. v. The Invader, 159 F. 2d 648 (2d Cir., 1947);

Lind v. U. S. 156 F. 2d 231 (2d Cir., 1946);

The Anglo-Saxon Petroleum Co. v. U. S., 88 Fed. Supp. 158 (D. C. Mass., 1950).

This recent group of cases actually is a consequence of war conditions; that is, vessels operating blacked out. However, the principle is the same as that enunciated in *The Grenadier*, 74 Fed. 974 (E. D. Pa. 1896), wherein the court, in considering the Starboard Hand Rule, held that it "clearly contemplates navigation under ordinary circumstances, where the vessels can see each other and thus ascertain their respective courses. Its application is impossible where the vessels are enveloped in dense fog, unable to see each other or to ascertain their respective location and bearings."

There is a very strong reason why the Starboard Hand Rule should not be applied to vessels enveloped in a fog. Every mariner knows and appreciates the difficulty of judging the direction from which sound comes in a fog. The Starboard Hand Rule requires one of the vessels to hold her course and speed. Assuming that one of the vessels could tell she was privileged, it would still be an intolerable and impossible obligation to place upon that vessel. Further, it directly conflicts with Article 16 which provides that a vessel "hearing, apparently forward of her

beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." The import of Article 16 is well known to the courts, admiralty proctors and mariners.

Fog navigation demands that *each* vessel shall reduce speed to the point where she can stop in her share of the visible distance and that *each* vessel shall stop when she hears a whistle forward of her beam and then proceed cautiously, *both* taking such action to avoid collision as circumstances dictate.

II.

The Faults of the Marsha Ann Were Plain, Flagrant and Inexcusable; and Were the Sole and Only Cause of the Collision.

A. The Marsha Ann Did Not Make Proper Use of Her Radar.

In reading appellants' opening brief we were struck with appellants' absolute failure to discuss or even mention what we consider to be a vital factor in this case—the MARSHA ANN's failure to properly use her radar.

At the conclusion of the trial, Judge Carter made certain remarks, which left us with the impression that such failure and the MARSHA ANN's excessive speed were decisive. [A. 572-577.] We feel that this collision cannot be intelligently discussed without taking both of these factors into account. Discussing individual points in the abstract is useless, because in a collision case all of the circumstances bearing on the collision are relevant and important.

The testimony of Bortul Zankich, radar operator aboard the MARSHA ANN, vividly described the part radar played in this collision. [A. 421-445.] Briefly summarizing: the MARSHA ANN was equipped with a Raytheon model S. O. -1 radar. It was working well at the time of the collision. In fact, the radar operator describes from his observations of the radar scope a very clear picture of the vessels in the vicinity, and particularly ahead of the MARSHA ANN. [A. 425.] Among other vessels the BEAR was plainly in "radar sight." [A. 377, 429.] All this information was being passed to the captain who was on the bridge. [A. 376, 429.] Notwithstanding this clear grasp of the situation, and the obvious fact that she was on a collision course with the BEAR, the MARSHA ANN literally shut her eyes and stood into the jaws of a collision.

We feel that the MARSHA ANN's fault is comparable to that of the BARRY in the case of *Barry v. Medford*, 65 Fed. Supp. 622 (E. D. N. Y. 1946). The BARRY had entered a fog bank at 18 knots. Her radar was not put in operation. About two minutes after entering the bank, she struck the fishing trawler MEDFORD on the starboard side just forward of amidships. The court found the BARRY solely at fault in spite of the absence of a lookout on the MEDFORD, and her use of an improper fog signal. At page 626 the court said:

"The failure of the Barry to use her radar is the most serious and sinister aspect of these causes. The perfection of that device is thought to have invoked a new concept of the responsibilities attaching to vessels so equipped, touching their handling and operation in or near a fog-bound area * * *."

“[T]he offending ship could have informed herself of the presence and track of the Medford in abundant time to have avoided by a wide margin any danger whatever of striking her. Under such circumstances it is impossible to yield to the argument for the Barry that her conduct is to be condoned to any extent, in view of her failure to employ the very device which was installed to prevent a collision.”

The BARRY was running blind at all times. She did not know that the MEDFORD or any other vessel was in the vicinity. The MARSHA ANN had the information and then knowingly ran blind. That is, notwithstanding the knowledge of the captain and radar operator that the MARSHA ANN's radar could not pick up the BEAR at less than 200 yards, she maintained a steady course and proceeded into the blind area. [A. 377, 422, 442.] It is incomprehensible that a vessel would deliberately proceed in a dense fog at considerable speed on a collision course—a course which would take her within the minimum 200 yards radar range, and cause her to run blind in dangerous proximity to another vessel.

As Judge Carter pointed out, the MARSHA ANN did not take any steps to avoid the collision, such as reversing her engines or coming to a stop. [A. 575; Finding VI, A. 63.] The most that can be said for the MARSHA ANN is that she disengaged her engine sometime before the collision. [A. 572.] There was another seamanlike maneuver open to the MARSHA ANN. As soon as she cleared the breakwater, she could have hauled off to starboard and stood well clear of the BEAR and the boat which was one or two points on her starboard bow. [A. 425.] The relative bearings of these boats were reported when the MARSHA ANN was headed in a southeast direction.

[A. 425.] Hence, she had plenty of sea room to the southwest. By promptly hauling off to starboard the MARSHA ANN could have kept the three boats, which were ahead, in radar sight at all times and missed them by the proverbial "mile."

The *Hindoo-Australian Star*, 74 Fed. Supp. 145 (S. D. N. Y., 1947), Affd. 172 F. 2d 472 (2d Cir., 1949), emphasizes that improper use of radar will not be condoned. The United States District Court, for the Southern District of New York, in holding the AUSTRALIAN STAR at fault for not using the information which was available on her radar, had this to say:

"* * * It has been suggested that to hold the Australian Star at fault is to penalize her because of her equipment with radar. That is a misconception. The conduct which is regarded as negligent upon the part of a person of sound vision is not the same as that which is condemned when practiced by the blind. *The fault of the Australian Star is that she chose to remain blind when she had the means to see.*

"Prudent navigation involves taking advantage of all of the safety devices at hand. * * *" (Emphasis added.)

Clearly the MARSHA ANN violated Article 29 of International Rules for the Prevention of Collisions at Sea, or as it is commonly known, The Rule of Good Seamanship, which provides:

"Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." (Emphasis added.)

B. The Marsha Ann's Speed at the Time of Sighting the Bear Was Excessive and Unwarranted.

Appellants have lifted two sentences from Judge Carter's remarks at the end of the trial as a basis for building an argument that the MARSHA ANN was dead in the water when the collision occurred. (Br. 39-40.) However, Judge Carter's very next paragraph completely shatters appellants' argument. We quote: "I think that the motors of the MARSHA ANN were not turning at the time of the collision. However, I think the MARSHA ANN at the time of the collision was sliding through the water fast enough to constitute negligence on the part of the MARSHA ANN, together with all the other circumstances of the case." [A. 572.]

It is true that appellants' witnesses were all claiming that the MARSHA ANN had been stopped for 5 to 7 minutes, was dead in the water, drifting, etc. [A. 362, 378, 382, 426, 494.] But the plain fact is that Judge Carter did not believe those statements. [A. 575.] Rather, he relied on the less dogmatic answers of appellees' witnesses and the uncontradictable physical damage to the BEAR.

Three of appellees' witnesses state that the MARSHA ANN had a bow wave when she came out of the fog at 50 feet. [A. 139-40, 267, 289.] When pressed to estimate the speed of the MARSHA ANN, appellees' witnesses guessed that it was anything between two to six knots. [A. 139, 176, 216, 253.] The difficulty of estimating the speed of a vessel coming out of a fog at 50 feet is granted. The physical damage sustained by the BEAR

as the result of the blow from the MARSHA ANN speaks for itself and is the best evidence. [A. 319-23.]

In an attempt to explain away the physical damage to the BEAR, appellants have concocted a completely fantastic theory. They maintain that the BEAR, on sighting the MARSHA ANN, turned hard port thereby swinging her stern into the MARSHA ANN's stem and causing the damage. (Br. 40-41.) Not only does the watch on the BEAR say that her rudder was not put over or her course changed [A. 141, 172-73, 216], but that theory just does not jibe with realities. It is physically impossible.

In the first place, there was not time to put the rudder over and have it catch. There were only a few seconds from the time of sighting until the collision—at the most 10 seconds. [A. 151, 172, 216.] Not only does it take time to turn the wheel itself but even after the rudder is over, it must catch. [A. 533-34.] At reduced speeds, a vessel answers the helm very slowly. [A. 182.]

Secondly, the point of impact was near, if not forward, of the BEAR's pivoting point. When the rudder catches, a ship turns or pivots around a point which is referred to as the pivot point. The stern, of course, kicks away from the direction of the turn. The pivot point varies with different ships and their condition of load. Normally, the pivot point is slightly forward of amidships. If the vessel is down by the stern, the pivot point moves aft. In this case, the BEAR was returning with a load of fish and would be down by the stern, hence her pivot point would

be aft. It is unlikely that there was any swing amidships where the MARSHA ANN hit the BEAR. [A. 142, 172, 288.]

There is no escaping that the MARSHA ANN was proceeding at an excessive speed when she emerged from the fog, a speed which gave the BEAR no chance whatever to escape.

C. The Marsha Ann Was Not Sounding the Proper Fog Signals and She Did Not Sound the "Correct" Danger Signal.

Appellants state that there is no "dispute" about the MARSHA ANN sounding the proper fog signals and the "correct" danger signal. (Br. 41.) We dispute it. Article 15(b) of the *International Rules* provides for a two-blast signal only by a vessel "having no way upon her." Merely stopping the engine is not enough. See *Griffith on Collision*, 1949, p. 342. Also, we question whether the MARSHA ANN gave the "correct" danger signal since the International Rules do not require or provide for a danger signal. See *Griffith on Collision*, 1949, p. 222. Farwell, *The Rules of the Nautical Road*, 2d Ed. 1944, pp. 59, 81.

We point this out only to clear the record. These whistle signals did not contribute to the collision. The sole and direct cause of the collision was the MARSHA ANN's excessive speed and her failure to use her radar properly.

III.

**The Alleged Faults of the Bear Are Not Established
or Supported by the Record.**

Appellants have practically taken a blanket exception to every finding of fact pertaining to the navigation and operation of the BEAR, and they have indicated that they would rely on all of them. (Br. 13.) Many of these exceptions have been glossed over or omitted entirely from appellants' argument, unless we are to make inferences. Notwithstanding, we are inclined to discuss fully every point appellants raise in this appeal. However, that would practically involve re-trying the case and, of course, we appreciate that such is prohibitive. Therefore, we shall confine ourselves to discussing what we believe to be the salient points and will otherwise answer appellants as briefly as possible, keeping in mind the scope of appellate review of factual findings in a non-jury proceeding.

We feel that the rule which restricts setting aside findings of fact by the trial judge is particularly applicable in this case. All the witnesses testified in open court. The testimony was most contradictory. There was a great deal of language difficulty because none of the witnesses possessed a satisfactory command of the English language. And especially, the trial judge was in the best position to observe and to pass on the credibility of each witness.

We merely refer to the "rule" because we are a little in doubt as to whether to state the Ninth Circuit Admiralty Appellate Rule in terms of "strong presumption" or "clearly erroneous." In *Wilmington Transp. Co. v. Edwards*, 95 F. 2d 283 (9th Cir., 1938), at 284, Circuit Judge Denman stated, "While this admiralty appeal is a trial *de novo*, the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard

all the witnesses, save one, and his deposition clearly sustains those heard.” More recently, the Ninth Circuit, in admiralty cases, has omitted all reference to a “trial *de novo*” and has referred to the “clearly erroneous” test of Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A.; *Compania Naviera Limitada v. Black*, 183 F. 2d 388, 391 (9th Cir., 1950); *Blake v. W. R. Chamberlin & Co.*, 176 F. 2d 511, 512 (9th Cir., 1949). See also *Smyth, C. I. R. v. Barneson*, 181 F. 2d 143, 144 footnote 2 (9th Cir. 1950).

Apparently, the distinction which once existed between civil and admiralty factual review has been abolished in the Ninth Circuit. As a practical matter, it is questionable whether a difference ever actually existed. Appellate review is a nebulous concept and escapes precise definition. The important thing in all cases is that appellant must show clearly that the trial court erred. As pointed out above, there are particularly strong reasons in this case for according the trial judge’s findings the greatest weight possible.

A. The Bear Had a Proper and Efficient Whistle and Was Sounding the Proper Fog Signals.

We cannot help but feel that all this discussion regarding the BEAR’s fog signals is moot. The purpose of sounding fog signals is to put vessels in the vicinity on notice of the presence of the sounding vessel. The MARSHA ANN had a far better indication on her radar of the BEAR’s position than she could ever hope to get from a fog signal. The radar also showed that the BEAR was moving and that is all the information the MARSHA ANN could possibly get from a fog signal.

Further, it appears that for some unknown reason no one on the MARSHA ANN heard the BEAR's fog signals. The "beep-beep" which Borcich heard [A. 378] certainly was not the BEAR's whistle, which was a practically new air whistle and made a loud sound. [A. 224, 556.] Under the circumstances it is hard to see how the BEAR's fog signals had any connection with the accident.

However, we would like to point out that the BEAR was not "merely answering the whistles of other vessels" as appellants say. (Br. 19.) The testimony of the BEAR's watch was direct and positive to the effect that the signal of a prolonged blast was being given at intervals of not more than two minutes, as required by the applicable rules. Additionally, there was testimony that answering signals were given by the BEAR as she was feeling her way along. [A. 175, 193, 195, 209-10, 214-15, 222, 231-32, 556.]

Article 15 of the International Rules sets the maximum interval for sounding fog signals. Not only is it permissive to signal more frequently but under certain circumstances good seamanship requires it. Farwell, in *The Rules of the Nautical Road*, 2d Ed., 1944, p. 198, says: "When a vessel, sounding proper signals, while navigating in Long Island Sound, turned into an occupied anchorage, she was found at fault for not increasing the frequency of her whistles to warn vessels already at anchor. And so when vessels are feeling their way past each other in a dense fog, there can be little doubt that legal obligation, as well as good seamanship, may require signals to be given every few seconds until both vessels are past and clear." Farwell cites *The Quivilly*, 253 Fed. 415 (E. D. N. Y., 1918), in support of this statement.

The cases which appellant cites (Br. 19-22) can all be distinguished on their facts. Either there was no signal at all or there was no regulation signal sounded or the vessel was using a fog horn when she should have been using a whistle.

B. The Bear Was Proceeding at a Moderate Speed With Due Regard to Existing Conditions and Circumstances.

Appellants seek to attack the trial court's finding that at the time of the collision the BEAR was virtually dead in the water and that the BEAR was not traveling at excessive speed under the circumstances. (Br. 23.) Appellants also state: "The District Court erred when it found: Sixth: (1) That at the time of the said collision the BEAR was proceeding at a speed of about one to one and one-half miles per hour." (Br. 23.) We believe that appellants' paraphrasing of the court's finding is not accurate. With regard to the one and one-half knot's speed, the court found: "Whistles of other vessels were heard in the vicinity of the BEAR as a result of which the BEAR alternately stopped and then proceeded with caution at a speed of approximately one and one-half miles per hour." [Finding V, A. 63.] At the time of the collision the BEAR was virtually dead in the water. [Finding V, A. 63.]

Appellants' argument is predicated on an average speed from Oceanside to San Pedro. (Br. 23-5.) The computations are based on a number of assumptions such as the time and point of departure, the speed the BEAR made over the ground, and when the BEAR reduced her speed. None of these factors are accurately known. Obviously no inference can be drawn from such a calculation.

The testimony of the BEAR's crew was all to the effect that immediately prior to the collision the BEAR was barely maintaining steerageway and that she was alternately stopping and then proceeding with caution at a speed of approximately one and one-half knots. [A. 137, 171, 240, 252.]

Appellants' argument on pages 25 to 26 of their brief does not make any sense because it fails to take two very important facts into account: (1) the speed of the MARSHA ANN, and (2) the angle from which the MARSHA ANN approached. According to everyone on the BEAR, the MARSHA ANN was headed directly for the BEAR's green light when she first loomed out of the fog at 50 feet. Therefore, if the BEAR had stopped dead in her tracks, the MARSHA ANN would still have hit the BEAR. As it turned out, the BEAR advanced about 8 to 12 feet and the MARSHA ANN struck approximately 10 to 12 feet aft of the green running light. [A. 140, 141, 157, 171-72, 288.] It is manifest that the BEAR's speed was moderate and had nothing whatsoever to do with the collision.

C. The Bear Was Maintaining a Proper and Efficient Lookout.

We have no quarrel with the general statements of law contained in the various opinions quoted by appellants on pages 27 to 30 of their brief. However, the circumstances and particular facts of each case must be considered. General principles cannot be applied at random. For example, appellants cite and quote from *The Sagamore*, 247 Fed. 743 (1st Cir. 1917). The Sagamore was 430 feet in length. The lookout was in the crow's nest some 60 feet above the water and 70 feet aft of the stem. The BEAR's lookouts were approximately 15 feet above the

water and about 20 feet abaft the stem. In *The Tillicum*, 230 Fed. 415 (9th Cir. 1916), the lookout was inside the pilot house. The BEAR's lookouts were stationed on an open platform with visibility all around. [A. 146.]

We would also like to call attention to one general principle not mentioned by appellants. As stated by Circuit Judge Swan in *Rice v. United States*, 168 F. 2d 219 (2d Cir. 1948) at page 1013: "It is well settled that the absence of a lookout is not material where the presence of one would not have availed to prevent the accident." See also *Griffith on Collision*, 1949, pp. 284-86. We point out this rule to emphasize the fact that an individual case can only be decided in the light of existing circumstances.

As a fact, however, we submit that the BEAR had a proper and efficient lookout. True there was no lookout stationed at the bow. However, there were five men on the open bridge [A. 146] and one man standing on deck on the starboard side [A. 136] who were looking and saw the MARSHA ANN. Boganovich testified he was stationed as a lookout on the open bridge with no other duties to perform and that he was looking out for other vessels. [A. 287.] We will not debate whether it was preferable to have a lookout on the open bridge or on the bow, although we do not believe that this is an open and shut case for stationing a man on the bow. See *Wilmington Transp. Co. v. Edwards*, *supra*. Actually, a man stationed on the bow of the BEAR would not have been as close to the MARSHA ANN as the men on the open bridge were when she emerged from the fog because of the angle of approach.

The very best evidence, however, of the efficiency of the BEAR's crew as lookouts is the fact that they picked up the MARSHA ANN at 50 to 60 feet, the maximum visibility [A. 137, 171, 215, 250, 287], whereas the men on the MARSHA ANN only picked up the BEAR at 20 to 25 feet. [A. 361, 379, 510.]

D. The Bear Alternately Stopped and Proceeded With Caution Upon Hearing Whistles in the Vicinity.

We can find only one sentence in appellants' entire argument which discusses how the trial court erred in the above finding. (Br. 32-35.) Even that sentence is gross speculation and obviously wrong. We refer to the sentence on page 35 of appellants' brief: "If the BEAR had stopped her engines upon hearing the said signals and if the MARSHA ANN was traveling at the rate of speed claimed by the appellees, the MARSHA ANN would have passed the point of collision and the collision would not have occurred."

The whole argument is devoted to spelling out the importance of Rule 16 and to proving that the MARSHA ANN approached from an angle forward of the BEAR's beam. We agree with appellants on both of those points. The important thing is that Judge Carter found that the BEAR was stopping and proceeding with caution when she heard the whistle signal of another vessel in the vicinity. [Finding V, A. 63.] There was substantial evidence to support this finding. [A. 171, 240, 252.]

IV.

**The Damages Awarded Appellees Were Reasonable,
and Certainly Not Excessive.**

Appellants contend that damages were allowed for repairs not necessitated by the collision. (Br. 36-38.) They say that certain of the BEAR's frames had to be replaced because of dry rot or old breaks and not because of the collision. Appellants also refer to non-collision repairs in places other than the frames, namely "the bilge area" and "many other breaks". (Br. 37.) We have reviewed the Apostles carefully, and particularly appellants' references. [A. 453, 488, 489.] As we read the testimony of Appellants' surveyor, he was discussing dry rot, breaks and non-collision damage in the frames only.

We call attention to the fact that the trial court already has deducted from the damages allowed, the cost of repairing all ninety frames, or \$3600.00. This is all spelled out in Judge Carter's Memorandum of Decision, filed May 31, 1950. [A. 47.]

The damages proximately resulting from a collision, the repairs which are necessary and the period of lay-up are impossible to establish with certainty. As appellants' surveyor put it, what should be repaired and what resulted from the collision are largely a matter of opinion. [A. 550.] He also added that opinions could differ between competent surveyors of equal caliber. [A. 550.]

The damages incurred by the BEAR, the caliber of the yard making the repairs, and the time necessary to effect repairs were exhaustively discussed and reviewed by the trial court. Surveyors for both parties appeared and testified at great length. [A. 301-350, 446-493, 534-555.] The damage to the BEAR has been summarized by Mr. Simms, her surveyor. [A. 319-323.]

It is obvious that the BEAR took a crushing broadside blow from the MARSHA ANN, a vessel some six times heavier than the BEAR. This blow wracked the BEAR from stem to stern and from topside to keel. Even the garboard strakes were sprung. [A. 323.] The damages allowed for the cost of repairing the BEAR and the lay-up time were reasonable and certainly not excessive.

V.

The Trial Court Properly Awarded Damages to the Fishermen for the Loss of Their Prospective Share in the Fish Catch.

A. Finding of Damages for Fishermen Is Sustained by the Evidence and Stipulations.

Appellants argue (Br. 49) that there was “no evidence whatsoever” for or on behalf of libelants Ray Zukowski and William T. Decker “proving or even tending to prove that they were damaged in any manner whatsoever.”

The fisherman appellees respectfully call the attention of the Court to the following:

1. The stipulation of the respondents before the lower court [A. 159-161], states:

“Mr. Fall: Well, this must be in. That he (Decker) attempted to get other employment during the period of time that the Bear was laid up for repairs, but he was unable to get employment. The reason was that other men had been employed for the season and there was no opening.

Mr. Callaway: Oh, I will stipulate he would so testify if he was called. So stipulated, that if he was called he would so testify.

“Mr. Fall: So stipulated.

The Court: At least he was not an eye witness.

Mr. Callaway: No.

The Court: All right, so stipulated. Can we then take an adjournment at this time, then?"

2. Joseph Ancich testified with reference to Ray Zukowski [A. 279]:

"Q. Do you remember Ray Zukowski? A. You mean the guy that lives at Tacoma?

Q. Yes. A. Yes, I know him.

Q. Did he accompany you at any time on these attempts to seek employment? A. Well, I used to go down to the call at Kello, down to 6. I saw him there every once in a while, a day, and he ask me once couple of dollars. I don't know I give him any money.

Q. Do you know whether or not he was seeking employment? A. I don't think he was working.

Q. Did you see him try to get a job? A. Yes, I see him try to get a job. He was down on slip, and on Terminal Island, trying to get a job. I don't think he have a job when I saw him."

3. The stipulation was entered into between the representative Proctors for all the litigants in the action. This Stipulation is attached to the Motion of the Appellees for Diminution of the Record on Appeal. It provides, on pages 3 and 4 thereof, as follows:

"Whereas, the parties to the action have now agreed, and by these presents stipulate that the following amounts are correct and may be found due the libelants and intervening libelant owners against the respondents for the matters and things and in the amounts herein set forth:

1. That the prospective catch which the Vessel "Bear" would have made, and for which damage is

allowable, for the period of thirty-eight (38) days which the Court found to be the reasonable lay-up time for the bids and repairs to the vessel "Bear", would have been two hundred seventy (270) tons;

2. That the price per ton was Fifty Dollars (\$50.00), making a total loss of catch in the amount of Thirteen Thousand Five Hundred Dollars (\$13,500.00);

3. That the crew members of the Vessel "Bear" were fishing on a lay of sixty-eight percent (68%) for the crew and thirty-two percent (32%) for the vessel;

4. That the intervening libelants, GEORGE KORGAN and SAM BILAS, be awarded the sum of Four Thousand Three Hundred Twenty Dollars (\$4,320.00) against the respondents as damages for the loss of use of their vessel "Bear" for the period of thirty-eight days;

5. That the sum of Nine Thousand One Hundred Eighty Dollars (\$9,180.00) be awarded the libelants and the intervening libelants GEORGE KORGAN, NICK MILOSEVICH, and W. H. HOOPES, against the respondents in equal shares of Nine Hundred Eighteen Dollars (\$918.00) each as and for loss of their fishing time."

The Stipulation above set forth is conclusive and binding upon the appellees. By such Stipulation, they agreed and consented to the Findings and Decree of the lower court to damages in the amounts set forth in the Decree in favor of the libelants and intervening libelants, which sums the appellees agreed were due as the result of the loss of fishing time by libelants and intervening libelants, which sums the appellees agreed were due as the result

of the loss of fishing time by libelants and intervening libelants Korgan, Milosevich and Hoopes.

The record shows that intervening libelant Hoopes made around \$500.00 during the period the BEAR was laid up for repairs. [A. 144.] In the preparation of the Findings of Fact and Conclusions of Law and the Final Decree, libelants took into consideration this sum and consented that the respondents were entitled to a reduction in the sum that was Stipulated to be due the intervening libelant Hoopes.

B. Fishermen May Maintain an Action for Wages Without Prepayment of Costs.

Appellants argue (Br. 42) that the court erred in finding the allegations of Article I of the original libel are true. This article alleges as follows:

“The libelant is a seaman, within the designation of persons permitted to sue herein without furnishing bond for or prepayment of, or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Sec. 1916, U. S. C. A.”

The law with reference to fishermen-seamen maintaining an action for wages without prepayment of costs as provided in Title 28, U. S. C. , Section 1916, is now settled in this Circuit.

Cekalovich v. Ruljanovich, 142 F. 2d 430 (9th Cir., 1944).

The libel included a cause of action for maintenance. The damages sustained by the seamen herein were the wages they lost by reason of the negligent act of the “MARSHA ANN” and its owners. It would seem not to

alter the right of the seaman by reason of the fact that the wages became due by someone, not his employer, by reason of the negligent act of the person liable.

If any one of the members of the crew of the "BEAR" had been injured in the collision and had lost his anticipated wages by reason thereof, it certainly could not be argued that he could not maintain an action for his lost anticipated wages, against the "MARSHA ANN."

Section 1916 of Title 28 is liberally construed in favor of seamen, who are wards of admiralty.

Grant v. U. S. S. B. E. F., 24 F. 2d 812 (2nd Cir., 1928).

C. The Fishermen Have a Cause of Action for Loss of Anticipated Wages.

The case of *Robins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303, 48 S. Ct. 135, 72 L. Ed. 290 (1927), relied upon by appellants is not in point. The Robins Dry Dock & Repair Co., had a contract with the owners of the S. S. "BJORNEFJORD" to repair her. The owners of the "BJORNEFJORD" under a Charter party with a third party, had the obligation to repair her. The Supreme Court succinctly stated the issues in that case as follows:

"The present libel 'in cause of contract and damage' seems to have been brought in reliance upon the allegation that the contract for dry docking between the petitioner and the owners 'was made for the benefit of the libellants and was incidental to the afore-said charter party,' etc. But it is plain, as stated by the Circuit Court of Appeals, that the libellants, respondents here, were not parties to that contract 'or in any respect beneficiaries' and were not entitled to

sue for a breach of it 'even under the most liberal rules that permit third parties to sue on a contract made for their benefit.' 13 F. (2d) 4.

"Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit."

In the case at bar, there was no contractual relationship between the "BEAR" and the "MARSHA ANN." The fishermen are not suing for damages resulting from the breach of any contract made between third parties under which they were claiming as beneficiaries.

In the case at bar there was a negligent act by the "MARSHA ANN." This negligent act caused a loss by the fishermen. This loss was foreseeable by the tort-feasor, and was found by the court to be a fact.

This court held in *Van Camp Sea Food Co. v. Di Leva*, 171 F. 2d 454 (9th Cir., 1948), that fishermen could maintain an action against the tort-feasor for their loss in the prospective catch.

In the present case, it was contended by the "MARSHA ANN" that the "BEAR" was solely at fault, and the negligence of the "BEAR" was the direct cause of the collision. If the respondents in the lower court had been able to prove their contention, then the owners of the "BEAR" would have been liable to the fishermen libelants for their loss of the prospective catch. With such a situation, the logical conclusion is that the libelants below, should have

had the owners of the "BEAR" bring an action against themselves for the benefit of their employees. It would have been directly analogous to the situation appearing in *Van Camp Sea Food Co. v. Di Leva, supra*.

If the fishermen have a cause of action for loss of the prospective catch, shall it be left to the owners of the vessel upon which they are employed, to determine the ultimate liability of the parties? The action might never be brought by the owners of a vessel, in behalf of their seamen, when there is a contention that there is either sole or mutual fault on their behalf.

If a seaman has a cause of action, is there any reason why he may not maintain the same in his own name? All of the fishermen were before the court in this action. There was no possibility of a multiplicity of actions.

In *Lind v. U. S.*, 61 Fed. Supp. 329 (E. D. N. Y. 1945), the fishermen members of the crew of a fishing vessel were permitted to bring an action in their own names. In this case the court found mutual fault, and a decree was made in favor of the fishermen libelants for full damages against both the vessel that collided with them, and against their own vessel.

Judge Carter, in his comprehensive decision in the case at Bar, ably dispels the inequities claimed by the appellants herein. His decision reads, in part, as follows:

"In *The Mary Steele, supra* [Fed. Cas. No. 9226, D. C. Mass. 1874], the owners and the crew were both parties to the libel and in *The Columbia, supra*

[Fed. Cas. No. 3025], the report of the commissioner, exceptions to which were overruled, allowed 'the seamen who libeled for their share, 1/6 of the catch so estimated.' These two cases, although not sustaining the right to a cause of action in the crew alone, throw doubt upon the broad statement contained in the Laflin case 'that neither the officers nor members of the crew may join with the owners in a recovery of the proceeds of a voyage.'

"It has long been recognized that the admiralty courts in the administration of justice, deal liberally with seamen. Seamen are the special wards of admiralty because of the nature of their services and its accompanying dangers. (Benedict on Admiralty, 6th Edition, Sec. 621.) The maritime courts having jurisdiction over seamen, have for generations made every effort to protect their rights and interests. Admiralty rules of pleading are to be liberally construed and in dealing with sailors' rights, admiralty will grant them relief if justice is served, and adjudge their rights where equity and expediency are gained. While an admiralty court does not have general equitable jurisdiction, it acts upon equitable principles and should give relief where a court of equity would relieve, and a court of law would not."

Benedict on Admiralty, 6th Edition, Sec. 223;

Watts v. Camors, 115 U. S. 353, 6 S. Ct. 91, 29 L. Ed. 406 (1885);

U. S. v. Cornell Steamboat Co., 202 U. S. 184, 26 S. Ct. 648, 50 L. Ed. 987 (1906);

Van Kamp Sea Food Co. v. Di Leva, 171 F. 2d 454 (1948).

“In *Van Kamp Sea Food Co. v. Di Leva, supra*, the sharesmen were allowed to maintain a libel for loss of earnings due to the lay up for repairs of their vessel from a collision caused by the negligent navigation of another vessel also owned by their employer. But the right of action was allowed the fishermen because the respondent owned both boats. The Court reasoned that the respondent could not be expected to sue itself for the benefit of the fishermen, hence the action was allowed on equitable principles. Judge Denman cut through legal form and procedure, and said in substance: Since the fishermen in justice and equity have an ultimate claim to their prospective share of the catch, then they may maintain a cause of action in their own names.

“In equity and justice, why should the recovery of loss of profits by seamen serving under the lay plan be contingent on the action taken by their employer?

“These fishermen have suffered serious damage as a result of the collision. They have no right of recovery against their master or the owner of the boat unless he be at fault. *Reed v. Hussey* (1836), Fed. Cas. No. 11646. Their ‘contract of employment’ is terminated by the operation of maritime law upon the breaking up of the voyage as a result of the collision. *The Elk*, 1938 A. M. C. 714. To refuse them the right to sue in their own names, places them at the whim and caprice of their employer and may involve conflicting interests.”

Why? Why in the name of law and equity—should a fisherman—not under the disability of minority or incompetency, be deprived of the right to maintain an action in his own name, for damages that he has sustained? It was stipulated that the fishermen did sustain damage. Does admiralty or equity deprive the seaman of the right to maintain an action for these damages? Is the foundation of the former law of procedure based upon a premise not present in the case at bar? If the fishermen have a cause of action, then why may they not maintain the same in their own names? If they have sustained damages, is there any reason in sound law and equity—and especially for these wards of admiralty—which holds that they may not protect and enforce their own rights?

We do not here have a case where the seamen are scattered to the four winds and are unable to enforce their rights, or even where only a portion are present.

In *U. S. v. Laflin*, 24 F. 2d 683 (9th Cir., 1928), at 685, the court said:

“We find no difficulty in sustaining the trial court’s conclusion that the owners *could* bring the action as representing the crew, and that within the meaning of the statute the latter *might* ‘submit their claim’ through him, and *might* sue him for damages if he neglected to prosecute the same.” (Emphasis added.)

It appears that the court felt that there was the permissive ability, and possibly mandatory, for the owners to sue. The exclusive right of the master to maintain the

action on behalf of the crew may be the law in the whaling industry, and in *U. S. v. Laflin, supra*, but where is the foundation for such law in the case of men fishing for sardines on the lay for the prospective catch?

The case of *Taber v. Jenny*, Fed. Cas. No. 13,720 is cited by the court in *U. S. v. Laflin, supra*, as authority for the law that the Master must bring suit for the seamen. In this case, the vessel had already caught the whale, which was the property of the vessel. The crew had no property right in the whale. The owner was the proper party to bring the action. The fishermen had no interest therein. They had an interest in the proceeds of the whale that was the property of the vessel and its owners. The case is not authority for the proposition that fishermen may not sue in their own names for the wages they would have earned from the prospective catch.

In *United States v. Laflin, supra*, the court cites *Baxter v. Rodman*, 3 Pick. 435, and *Grozier v. Atwood*, 4 Pick. 234, for the proposition that the crew cannot sue for proceeds of the voyage. Both of these cases are actions *in assumpsit* for a portion of a catch already made. Neither case involves an action sounding in tort for a share of the anticipated catch. The dictum in the cases relying on *Taber v. Jenny, supra*, *United States v. Laflin, supra*, *Baxter v. Rodman, supra*, and *Grozier v. Atwood, supra*, as authority for the proposition that a crew member may not join in an action for a recovery of his loss of wages is of no authority for the question before the present court.

Conclusion.

When all the facts and circumstances bearing on this collision are considered, analyzed and weighed, it is certain that the collision was caused by two things: (1) the MARSHA ANN's improper use of radar, and (2) the MARSHA ANN's excessive speed. The navigation of the BEAR is unassailable, and she was operating in compliance with the International Rules for the Prevention of Collisions at Sea. The most critical seaman could not say that her maneuvers or signals contributed in any way to the collision.

The damages awarded by the trial court were reasonable. A cause of action sounding in tort has been made out by the fishermen for the loss of their prospective share in the fish catch.

The findings and decree of the District Court, holding the MARSHA ANN solely at fault for the collision are completely substantiated by the record. The decree should be affirmed, with costs to appellees.

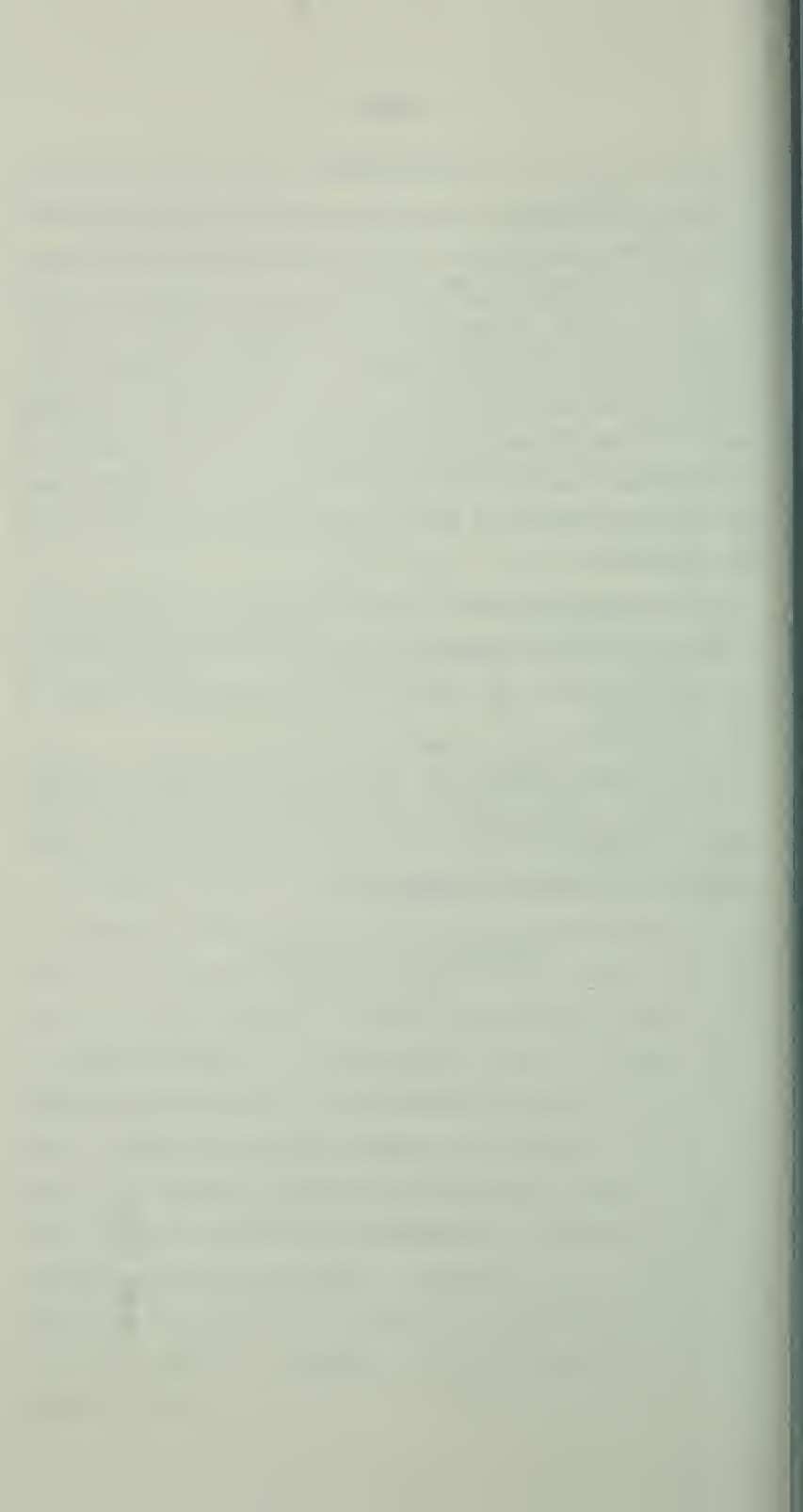
Respectfully submitted,

DAVID A. FALL,

EKDALE AND SHALLENBERGER,
GORDON P. SHALLENBERGER, and

LILLICK, GEARY & MCHOSE,
WILLIAM A. C. ROETHKE,
LAWRENCE D. BRADLEY, JR.,

Proctors for Appellees.



No. 12763

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

A. A. SEE and C. M. COSTNER, Co-Partners,
Doing Business as COSTNER & SEE,
Appellees.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Certificate of Clerk to Record on Appeal.....	13
Complaint	3
Designation of the Record.....	13
<i>MOTION FOR DISMISSAL</i>	<i>12 A</i>
Names and Addresses of Counsel.....	1
Notice of Appeal.....	12
Notice of Argument.....	9
Order Granting Motion for Dismissal.....	10
Statement of Points.....	16

NAMES AND ADDRESSES OF COUNSEL

J. CHARLES DENNIS and

JOHN E. BELCHER,

Attorneys for Appellant,

1017 United States Court House

Seattle 4, Washington.

ARTHUR L. HAUGAN and

GERARD M. SHELLAN,

Attorneys for Appellee,

922 Third Avenue,

Renton, Washington.

United States District Court, Western District of
Washington, Northern Division

No. 2491

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. A. SEE and C. M. COSTNER, co-partners doing
business as COSTNER & SEE,

Defendants.

COMPLAINT

Comes now United States of America, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and John E. Belcher, Assistant United States Attorney for the same district, and respectfully alleges and shows.

I.

That jurisdiction of this Honorable Court is conferred by the provisions of Section 2(a) (6), Title III of the Second War Powers Act (56 Stat. 176, 50 U.S.C. App. 633), Section 7(a) and 7(c) of the Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. App., Section 1821 et seq.) and Section 24 of the Judicial Code (54 Stat. 143, 28 U.S.C.A. 1345), and brings this suit for restitution of amounts due veterans of World War II for violating Section 944.54(a) Priorities Regulation 33, by the defendants herein.

II.

That defendants A. A. See and C. M. Costner are copartners, doing business as Costner & See, at Renton, King County, Washington, in the Northern Division of the Western District of Washington.

III.

That heretofore and on or about the 22nd day of May, 1946, defendants made written application to the United States Production Administration on form C.P.A. 4386, under Priorities Regulation 33, as amended, Veterans' Emergency Program for the construction of two five-room dwellings, including garages, on Tract 9, Highland Addition to the town of Renton, to be sold to veterans of World War II at the maximum sales price per complete unit, including land, of \$6750 each, furnishing at said time outline specifications (form HH 1012) to the Federal Housing Administration, which application was granted August 26, 1946, by the Federal Housing Administration, and Priority No. 88-127-0333 assigned thereto.

IV.

That thereafter and on September 9, 1946, defendant A. A. See, acknowledged in writing addressed to the Federal Housing Administration, receipt of such priority authorization, and thereafter and on September 16, 1946, said construction was inspected by and at that stage approved by the Federal Housing Administration Inspector.

V.

That on the 11th day of February, 1947, an agent of the defendants entered into an agreement in writing with one Lovell S. Sherin, a veteran qualified to purchase, and his wife Edna Marie Sherin, by the terms of which, subject to the approval of the owners, the defendants herein, the said Lovell S. Sherin paid to said agent the sum of One Hundred Dollars, earnest money, and defendants agreed to sell, and the said Lovell S. Sherin agreed to buy one of the dwellings herein mentioned, for the sum of Eight Thousand Five Hundred (\$8,500.00) Dollars, said dwelling being located on the following described real property, to-wit:

“North 45 feet of the So. 90 feet of Tract 9,
Highland Addition to the Town of Renton * *”

the terms being One Thousand (\$1000.00) Dollars down payment, (including One Hundred (\$100.00) Dollars earnest money).

“Balance, Seven Thousand, Five Hundred (\$7,500.00) Dollars, subject to approval of G.I. loan; seller to complete construction of house in accordance with terms list on reverse side hereof.” On the reverse side of said earnest money receipt is endorsed the following:

“Seller to complete garage, build walkways, and front and back entrance to sidewalk. Furnish shades for entire house, furnish light fixtures for entire house. Build a rockery in the front of the house and place oil tanks under-

ground. Backfill to be graded to level with top of basement stairwell. Repair basement and waterproof same. Build small overhead porch over front steps.”

That defendant herein approved said sale by affixing their respective signatures to said earnest money receipt, well knowing at said time that the maximum price they could lawfully charge and receive for said property was the sum of Six Thousand, Seven Hundred Fifty (\$6750.00) Dollars.

VI.

That thereafter, through the Renton Branch Peoples National Bank of Washington, a G.I. loan in the sum of Seven Thousand, Five Hundred (\$7500.00) Dollars was negotiated by the said Lovell S. Sherin, being V.A. Loan No. 1015, and said sum, together with One Thousand, Forty-six (\$1046.00) Dollars, furnished by the said Sherin, was paid over to Wallin & Edwards, as agents for defendants caused to be delivered to the said Sherin a statutory warranty deed to the premises herein described, which was duly recorded in the office of the Auditor of King County, Washington, under auditor's fee No. 3679578, dated March 27, 1947, and recorded in Vol. 2614 Deeds, page 492, and a mortgage on said premises was executed by the said Sherin and wife for the sum of Seven Thousand, Five Hundred (\$7500.00) Dollars.

VII.

That said sale so consummated was in violation of the maximum sale price fixed by Federal Housing

Authority and Priority Regulation 33, in that said sale price so charged and collected by defendant exceeded the maximum sale price so fixed by the sum of One Thousand, Seven Hundred and Fifty (\$1,750.00) Dollars, in which sum plaintiff seeks restitution for the benefit of said veteran.

And for a Second Cause of Action

I.

Plaintiff hereby adopts paragraphs I, II, III and IV of its first cause of action, and makes the same a part hereof by reference and without repetition.

II.

That on the 27th day of February, 1947, an agent of defendants entered into an agreement in writing with Robert W. Collins, a veteran of World War II, qualified to purchase, and Maxine A. Collins, his wife, by the terms of which, subject to the approval of the owners, the defendants herein, the said Collins paid said agent the sum of One Hundred (\$100) Dollars, and defendants agreed to sell and the said Robert W. Collins and wife agreed to buy one of the dwellings herein mentioned, for the sum of Eight Thousand, Five Hundred (\$8500.00) Dollars, said dwelling being located on the following described real property, to-wit:

“South 45’ of Tract 9 of Highland Addition to the Town of Renton.”

the terms being One Thousand (\$1000.00) Dollars down (including One Hundred Dollars earnest money), “balance of \$7500.00 subject to G.I. loan.

Also subject to the sale of purchasers' property at 12523-112th S.E., Windsor Hills."

That defendants herein approved said sale by affixing their signatures thereto, well knowing at said time that the maximum price they could lawfully charge and receive for said property was the sum of Six Thousand, Seven Hundred Fifty Dollars.

III.

That thereafter, a G.I. loan was negotiated and the purchase closed through Wallin Edwards, Inc., Renton, Washington, and defendants caused to be delivered to the said Robert W. Collins and wife a statutory warranty deed to the premises herein described, which was duly recorded in the office of the Auditor of King County, Washington, under Auditor's Fee No. 3704977, in Vol. 264 Deeds, at page 433, and a mortgage was executed by said Collins and wife in the amount of Seven Thousand, Five Hundred (\$7500.00) Dollars.

IV.

That said sale so consummated was in violation of the maximum sales price fixed by Federal Housing Authority and Priority Regulation 33, in that said sales price, so charged and collected by defendants, exceeded the maximum sales price so fixed by the sum of One Thousand, Seven Hundred Fifty (\$1750.00) Dollars, in which sum plaintiff seeks restitution for the benefit of said veteran.

Wherefore, plaintiff prays the judgment and decree of this honorable Court as follows:

1. On its first cause of action herein for the benefit of Lovell S. Sherin, restitution in the sum of One Thousand, Seven Hundred Fifty (\$1750.00) Dollars.

2. On its second cause of action herein for the benefit of R. W. Collins, restitution in the sum of One Thousand, Seven Hundred Fifty (\$1750.00) Dollars.

3. Besides its costs and disbursements herein expended, and such other and further equitable relief as to the Court seems meet and proper.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States
Attorney.

[Endorsed]: Filed March 16, 1950.

Defendant's Motion for Dismissal is at page 12a

[Title of District Court and Cause.]

NOTICE OF ARGUMENT

To the above-named defendants and Arthur L. Haugan and Thomas Keefe, their attorneys, 922-3d Ave., Renton, Wash.

You, and each of you, will please take notice that your motion for dismissal in the above-entitled cause will be brought on for argument before the Hon. John C. Bowen, 6th Floor, United States Court House, Seattle, on Monday, August 14, 1950, at 10:00

a.m., or as soon thereafter as counsel can be heard.

Dated this 10th day of August, 1950.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States
Attorney.

[Endorsed]: Filed August 10, 1950.

United States District Court Western District of
Washington, Northern Division
No. 2491

UNITED STATES OF AMERICA,
Plaintiffs,
vs.

A. A. SEE and C. M. COSTNER, co-partners doing
business as COSTNER & SEE,
Defendants.

ORDER GRANTING MOTION
FOR DISMISSAL

This cause came regularly on for hearing before the undersigned Judge in the above-entitled Court on the 30th day of August, 1950, pursuant to continuance from August 28, 1950, upon the Motion for Dismissal filed herein by the Defendants; the Plaintiff appearing and being represented by John E. Belcher, Assistant United States Attorney; the Defendants appearing and being represented by their counsel of record, Arthur L. Haugan; the Court having heard argument of counsel for the respective

parties and having considered the written memoranda of authorities filed by the respective parties, and the Court having considered the matter and being fully advised in the premises and the law; now therefore

It Is Hereby Ordered, Adjudged and Decreed that Defendants' motion for dismissal filed herein should be and the same is hereby granted; and the above-entitled action and all causes of action therein set forth be and the same are hereby dismissed.

To all of which Plaintiff excepts, and exception is allowed.

Done In Open Court this 12th day of September, 1950.

/s/ PEIRSON M. HALL,
District Judge.

Presented By:

/s/ ARTHUR L. HAUGAN,
Of Counsel for Defendants.

Approved as to Form and Notice of Presentation
Waived:

/s/ J. CHARLES DENNIS,
United States Attorney.

By /s/ VAUGHN E. EVANS,
Assistant U. S. Attorney.

[Endorsed]: Filed and entered September 12,
1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiff, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered herein on the 12th day of September, 1950.

Dated this 10th day of November, 1950.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Asst. United States Attorney.

[Endorsed]: Filed November 10, 1950.

[Title of District Court and Cause.]

MOTION FOR DISMISSAL

Come now the Defendants and respectfully move the Court for an Order dismissing the above entitled action and each separate cause of action therein, on the following grounds:

(1) That the Complaint and each separate cause of action therein fails to state sufficient facts to constitute a cause of action against Defendants.

(2) That the Court does not have jurisdiction of this action or the subject matter.

(3) That the Plaintiff is not entitled to the relief prayed for nor entitled under the law to maintain said action.

(4) That this action and each separate cause of action therein, being for the benefit of private individuals therein named, is barred by the applicable Statute of Limitations and has not been brought within the time limited by law; which appears from the allegations of the Complaint.

This Motion is based upon the files and records herein and is made pursuant to rule XII, Federal Rules of Procedure.

/s/ ARTHUR L. HAUGAN,
ARTHUR L. HAUGAN &
THOMAS KEEFE,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed July 19, 1950.

Procedure, I am transmitting herewith all the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said cause. The papers herewith transmitted constitute the record on appeal from the order granting motion for dismissal filed and entered September 12, 1950, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Complaint, filed March 16, 1950.
2. Praecipe for the Process, filed March 16, 1950.
3. Marshal's Return on Summons, filed March 31, 1950.
- 3(a). Appearance of Defense, filed April 3, 1950.
4. Motion of Defendants for Dismissal, filed July 19, 1950.
5. Plaintiff's Motion for Motion Calendar on Motion for Dismissal, filed August 10, 1950.
6. Plaintiff's Memorandum filed August 10, 1950.
- 6(a). Defendants' Memorandum of Authorities on Motion to Dismiss, filed August 28, 1950.
7. Defendants' Supplemental Memorandum on Motion to Dismiss, filed August 31, 1950.
8. Order granting Motion for Dismissal, filed and entered September 12, 1950.
9. Plaintiff's Notice of Appeal filed November 10, 1950.

10. Plaintiff's Designation of Record on Appeal, filed November 14, 1950.

11. Plaintiff's Statement of Points Relied Upon on Appeal, filed November 14, 1950.

I further certify that the following is a true and correct statement of all expenses, costs, fees, and charges incurred in my office for preparation of the record on appeal in this cause, to-wit:

Plaintiff's Notice of Appeal.....\$5.00

In Witness Whereof, I have hereto set my hand and affixed the Official Seal of said District Court at Seattle, this 6th day of December, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12763. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. A. A. See and C. M. Costner, co-partners, doing business as Costner & See, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 8, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 12763

UNITED STATES OF AMERICA,
Appellant,
vs.

A. A. SEE and C. M. COSTNER, co-partners, doing
business as COSTNER & SEE,
Defendants.

STATEMENT OF POINTS

I.

Appellant, United States of America, hereby adopts the statement of points relied upon on appeal heretofore filed with the Clerk of the District Court for the Western District of Washington, Northern Division, as follows:

1. That the District Court erred in granting defendants' motion to dismiss and entering an order of dismissal because:

(a) The court has jurisdiction of both the parties and the subject matter.

(b) The complaint states a cause of action entitling the plaintiff to the relief prayed for.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States
Attorney.

[Endorsed]: Filed January 15, 1951.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

A. A. SEE and C. M. COSTNER,
Co-partners, doing business as
COSTNER & SEE,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

REPLY BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

VS.

A. A. SEE and C. M. COSTNER,
Co-partners, doing business as
COSTNER & SEE,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

REPLY BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

INDEX

	Page
STATEMENT	1
ARGUMENT	4
DISTRICT COURT'S JURISDICTION REGARDLESS OF AMOUNT INVOLVED..	11
CONCLUSION	12

UNITED STATES CODE

Title 28, Section 1332.....	3, 10
Title 28, Section 1345	10
50 App., Section 633.....	2

U. S. STATUTES

60, p. 210.....	2
-----------------	---

FEDERAL REGISTER

11 pp. 601 - 604.....	5
-----------------------	---

PRIORITIES REGULATIONS

33, Sec. 944-54	3
-----------------------	---

TABLE OF CASES

<i>Adams v. Albany</i> , 80 Fed. Supp. 876.....	9
<i>Bell v. Hood</i> , 327 U.S. 678.....	8
<i>Binderup v. Pathe Exchange</i> , 263 U.S. 291.....	9
<i>Blood v. Fleming</i> , 161 F. (2d) 292.....	9
<i>Bowles v. Skaggs</i> , 151 F. (2d) 817.....	7

	Page
<i>Creedon v. Randolph</i> , 165 F. (2d) 918.....	9
<i>Fields v. Washington</i> (3 Cir.) 173 F. (2d) 701..	11
<i>Geneva Furniture Co. v. Karpen</i> , 238 U.S. 254....	9
<i>Illinois Central R. Co. v. Adams</i> , 180 U.S. 28....	9
<i>Keele v. United States</i> , 178 F. (2d) 766.....	7
<i>Keele v. Holt</i> , 171 F. (2d) 480.....	9
<i>Swafford v. Templeton</i> , 185 U.S. 487.....	8
<i>United States v. Beebe</i> , 127 U.S. 338.....	9
<i>United States v. Carter</i> , 171 F. (2d) 530.....	7
<i>United States v. Craig</i> , N.D. Mex. No. 1331, 11/18/48 unreported	9
<i>United States v. Hartupee</i> , E.D.Mo., E.Div. No. 6444 (3), unreported	9
<i>United States v. Shaw Tenenbaum Const. Co.</i> , 9 F.R.D. 533	9
<i>Wiley v. Sinkler</i> , 179 U.S. 58.....	8
<i>Wood v. Bombay</i> , (3 Cir.) 179 F. (2d) 565.....	11
<i>Woods v. Kern</i> , 181 F. (2d) 499.....	11
<i>Woods v. Richman</i> , (9 Cir.) 174 F. (2d) 614....	11

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

A. A. SEE and C. M. COSTNER,
Co-partners, doing business as
COSTNER & SEE,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

REPLY BRIEF OF APPELLANT

STATEMENT

While counsel for appellees say at the beginning of their brief that the Act of Congress upon which this action must rest is the Veterans Emergency Housing Act of 1946 (60 Stat. 207, Title 50 App. 86) the Second War Powers Act and the Executive

Orders issued thereunder, and the various priority regulations, they studiously ignore Priorities Regulation 33 (11 F. R. 601) which was promulgated under the Second War Powers Act, as amended.

The jurisdiction to enforce the provisions of the Act and the regulations thereunder is derived from sub-paragraph six of Section 633, Title 50 App. U. S. C. A., which provides in its applicable portion:

“The District Courts of the United States * * * shall have jurisdiction of the violations of this sub-section (a) or any rule, regulation, or order or subpoena thereunder whether heretofore or hereafter issued, and of all civil actions under this sub-section (a) *to enforce any liability or duty created by law*, or to enjoin any violation of this section (a) or any rule, regulation or subpoena thereunder whether heretofore or hereafter issued. * * * Any civil action may be brought in any such district or in the district in which the defendant resides or transacts business.”

Nothing whatever is said concerning jurisdictional amount.

Section 5 of the act (60 Stat. 210) provided:

“It shall be unlawful for any person to effect * * * a sale of any housing accommodations at a price in excess of the maximum sales price applicable to such sale under the provisions of this Act * * *. It shall be unlawful for any person to violate the terms of any regulation or order issued under the provisions of this Act.

* * * Notwithstanding any termination of this Act as contemplated in Section 1 (b) hereinabove, the provisions of this Act, and of all regulations and orders issued thereunder, shall be treated as remaining in force, as to the rights or liabilities incurred * * * prior to such termination date, for the purpose of sustaining any proper suit, action or prosecution with respect to any such right, liability or offense."

This being a special Act, its provisions are controlling over the general act (Title 28, U.S.C., Sec. 1332).

The Priorities Regulation 33, by Sec. 944.54, reads: What this regulation does:

"(a) This regulation sets up the Reconversion Housing program of the Civilian Production Administration.

"It is designed to assist private builders, educational institutions and others to build moderate cost housing accommodations to which veterans of World War II will be given preference, by giving a H.H. preference rating for certain building materials for the construction. The regulation describes the methods of applying for H.H. rating, the circumstances under which the rating will be assigned, the materials for which it will be given and the conditions imposed on the builder and succeeding owners in selling or renting the accommodations as long as this regulation is in force. * * *

"(b) Applications. A person who wishes to build, complete or convert moderate cost housing accommodations under the Reconversion Housing Program may apply on Form C.P.A.-4386 for an H.H. preference rating for materials of

the kinds listed in Schedule A which are needed for the project. The application should be filed with the appropriate State or District Office of the Federal Housing Administration. * * *

“(d) Use and effect of H.H. ratings:

1. The H.H. rating assigned for a project may be used only to get materials of the kind listed on Schedule A of this regulation which are required for the project. The rating may be applied to a purchase order only by placing on the order the following certificate (the certificate set forth in Priorities Regulations 3 and 7 may not be substituted for this certificate).

Appellees, builders, made application to the Federal Housing Administration for priorities assistance in constructing the two houses here involved in the manner and form and on the form specified in paragraph (b) of Priorities Regulation 33.

ARGUMENT IN ANSWER TO APPELLEES

The Federal Housing Administration was the agency authorized by law to fix the maximum sales prices for dwellings constructed with priorities assistance under Priorities Regulation 33. In this case it fixed the maximum sales price of each dwelling at \$6750.00 each, including the land. Appellees charged and collected from each veteran purchaser \$8500.00, making an overcharge on each dwelling of \$1750.00.

Priorities Regulation 33 provides in pertinent portions:

(We have heretofore set out herein paragraphs (b) and (d).

Paragraph (e) provided:

“(e) Construction of the project.

A builder who uses the H.H. rating to get materials for housing accommodations must construct them in accordance with the description given in the application, except where he has obtained from the Federal Housing Administration approval for a change from the application.

“(ii) *A builder must not sell a one-family dwelling built * * * under the Reconversion Housing Program, including the land and all improvements (including garage if provided) for more than the maximum sales price specified in the application, including within this sales price the amount of any brokerage fees or commission paid in connection with the sale, whether paid by the builder or the purchaser.*”

(11 F.R. 601-604) (Italics ours)

The regulation by paragraph 7 provides that the builder, under certain conditions may make a request for increase in the sales price. No such request was made in this case.

Counsel for appellees say the complaint is based on the naked fact of an apparent excess in selling price over the maximum set by the Expediter's Of-

fice entirely without regard to whether or not appellees actually made any profit whatever over their cost of building.

Again, at p. 4, counsel say: "the veteran purchaser of one of the houses has subsequently resold the house at a profit to himself over the alleged excessive purchase price, and that the veteran purchaser of the other house has refused to re-sell it to appellees for the amount of the purchase price, but has offered it for re-sale at a figure \$2000.00 higher."

There is absolutely nothing in the record to justify such extravagant statements.

Such argument has no place on this appeal. If true, it is a matter of defense in a proper case, but has absolutely no value here.

It is argued that the Government here is seeking recovery of money for the benefit of private persons. (Br. 4). This is incorrect. The Government, as this Court well knows, puts up, by way of loan to the veteran, the entire amount of the purchase price, and through the F.H.A. and other agencies advances this money to the particular bank taking the mortgage, and in this District at least any recovery made is paid into the registry of the court, and thereafter disbursed to the banking institution holding the mortgage. In other words, the Government gets back

a part of that which it originally loaned the veteran.

The prayer of the complaint was for equitable relief.

Counsel say (Br. 5) that the lower court, "declined to entertain this suit, or to assume jurisdiction."

This is the assumption of counsel, because there is nothing in the written order of dismissal (R. 12) which in the slightest degree indicates what counsel say was the ground upon which the motion to dismiss was granted.

The grounds of appellees' motion to dismiss are set up at pp. 5-6 of the brief.

At p. 6, counsel say the question presented on appeal is:

" * * * whether it must be held as a matter of law that the lower court erred *in declining to entertain equity jurisdiction in this case*. More specifically, was the granting of the motion for dismissal neither proper under applicable law, nor justifiable in the exercise of equity prerogatives and discretion, if granted upon any one or all of the grounds and propositions * * *."

This question it seems to us is foreclosed by the cases of *Bowles v. Skaggs*, 151 F. (2d) 817; *U. S. v. Carter*, 171 F. (2d) 530, and *Keele v. United States*, 178 F. (2d) 766.

The Court did exercise jurisdiction in this case and we may properly assume that he concluded that the complaint did not state a cause of action on which relief may be granted.

In the case of *Bell v. Hood*, 327 U.S. 678, 682, the U. S. Supreme Court said:

“Thus allegations far less specific than the ones in the complaint before us have been held adequate to show that the matter in controversy arose under the Constitution of the United States. *Wiley v. Sinkler*, 179 U.S., 58, 65-5; *Swafford v. Templeton*, 185 U.S. 487, 491-92.

“The reason for this is that the Court must assume jurisdiction to decide whether the allegations state a cause of action on which the Court can grant relief as well as to determine issues of fact arising in the controversy.

“Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact, it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. *Swafford v. Tem-*

pleton, 185 U.S. 487, 493-4; *Binderup v. Pathe Exchange*, 263 U.S. 291, 301-8."

See also *Illinois Central R. Co. v. Adams*, 180 U. S. 28; *Geneva Furniture Co. v. Karpen*, 238 U.S. 254.

Counsel also argue that the one year limitation in Sec. 7 of the Veterans Emergency Housing Act of 1946 is applicable here.

This question is likewise foreclosed by the decisions of various District Courts.

U. S. v. Craig, No. 1331 N.D. Mex. 11/8/48, unreported;

U. S. v. Hartuppee, No. 6444 E.D. Mo. E. Div. 4/24/50, unreported;

U. S. v. Shaw Tenenbaum Const. Co., Inc., No. 5897, 9 F.R. Dec. 533;

Keele v. Holt, 171 F. (2d) 480;

Blood v. Fleming, 161 F. (2d) 292;

Creedon v. Randolph, 165 F. (2d) 918;

U. S. v. Beebe. 127 U.S. 338, 344.

There is no merit whatever in the point made by counsel for appellees at p. 11 of their brief that in this type of suit that there must be involved \$3000.00. Counsel cite as sustaining authority the case of *Adams v. Albany*, 80 F. Supp. 876.

In that case District Judge Yankwich, at p. 879 said:

“As the forty-one first causes of action are brought under the Housing Act, they are causes of action arising under a statute of the United States. This being the case, unless the Act establishing the action specifically grants to the district courts jurisdiction *regardless of the amount involved*, the general rule which makes our jurisdiction dependent upon the presence of both Federal question and a jurisdictional minimum of three thousand dollars applies.”

(28 U.S.C.A., 1332)

In that case, the veterans brought the action themselves, but did not commence it within the one-year period of limitation prescribed in the act.

The rule is different and an entirely different statute is involved where the suit is instituted by the United States.

Title 28, Section 1345, U.S.C. provides:

“Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.”

DISTRICT COURT'S JURISDICTION REGARDLESS OF AMOUNT INVOLVED

The following cases definitely settle, we believe the question of jurisdictional amount in cases of this nature:

Fields v. Washington, (3 Cir.) 173 F. (2d) 701;
Wood v. Bombay, (3 Cir.) 179 F. (2d) 565;
Woods v. Kern, 181 F. (2d) 499.

In *Woods v. Richman*, (9 Cir.) 174 F. (2d) 614, *Porter v. Warner Holding Co.*, 328 U.S. 395, is cited as authority for holding that restitution may be had for overcharges in rentals.

In that case the District Court had dismissed the action of the Housing Administrator and in reversing, this Court said (P. 616):

“We think, therefore, that it continues to be appropriate for the Courts to consider whether an order of restitution should be made as a means of giving effect to the declared policy of Congress.

“The judgment appealed from is accordingly reversed and the cause remanded with directions to the Court to hear the evidence, and, in the light thereof to exercise the discretion which belongs to the Court.”

CONCLUSION

It is respectfully submitted that the district court erred in dismissing this action and its judgment should be reversed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

No. 12763

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.

A. A. SEE and C. M. COSTNER,
Co-partners, doing business
as COSTNER & SEE,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

BRIEF OF APPELLANTS

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON

FILED

FEB 26 1951

PAUL E. O'BRIEN

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.

A. A. SEE and C. M. COSTNER,
Co-partners, doing business
as COSTNER & SEE,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

BRIEF OF APPELLANTS

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON

INDEX

Page

JURISDICTION	1
MOTION TO DISMISS.....	4
PRELIMINARY STATEMENT	2
STATEMENT OF THE CASE.....	6
ASSIGNMENT OF ERRORS AND STATE- MENT OF POINTS.....	10
ARGUMENT	10

UNITED STATES CODE

Title 28, Sec. 1291.....	2
Title 50, App. 925(a).....	11
Title 50, App. 633.....	3

STATUTES AT LARGE

54 Stat. at Large, 143.....	2
56 Stat. at Large, 176.....	2

EMERGENCY PRICE CONTROL ACT, 1942

Sec. 205(a)	14
-------------------	----

JUDICIAL CODE

Section 24	2
------------------	---

SECOND WAR POWERS ACT

Title III, Sec. 2(a) (6).....	1
-------------------------------	---

VETERANS EMERGENCY HOUSING ACT, 1946

Section 1821 et seq.....	1, 2
--------------------------	------

FEDERAL REGISTER

	Page
11, 1939	3
11, 9507	3
12, 2111	3

TABLE OF CASES

<i>Bowles v. Skaggs</i> , 151 F. (2d) 817.....	13
<i>Blood v. Fleming</i> , 161 F. (2d) 292.....	15
<i>Cotton v. United States</i> , 11 How. 229, 231.....	18
<i>Creedon v. Randolph</i> , 165 F. (2d) 918.....	15
<i>Hecht Co. v. Bowles</i> , 321 U. S. 321, 329.....	12
<i>Ins. Co. of No. America v. U. S.</i> (4 Cir.) 159 F. (2d) 699	19
<i>Keele v. Holt</i> , 171 F. (2d) 480.....	14
<i>Nesseth v. Creedon</i> , 80 F. Supp. 269.....	14
<i>Phelps Dodge Corp. v. Labor Board</i> , 313 U. S. 177, 194	13
<i>Porter v. Warner Holding Co.</i> , 328 U.S. 395.....	12
<i>United States v. Beebe</i> , 127 U.S. 338, 344.....	17
<i>United States v. Cooper Corp.</i> , 312 U.S. 600, 604..	18
<i>United States v. Carter</i> , 171 F. (2d) 530.....	13
<i>United States v. Duke Building Corp.</i> , 79 F. Supp. 681	16
<i>United States ex rel Marcus v. Hess</i> , 317 U. S. 537, 550	18
<i>United States v. Summerlin</i> , 310 U.S. 414.....	19
<i>Virginia R. Co. v. System Federation</i> , 300 U.S. 515	12

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.

A. A. SEE and C. M. COSTNER,
Co-partners, doing business
as COSTNER & SEE,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

BRIEF OF APPELLANTS

JURISDICTION

The jurisdiction of the District Court is conferred by Sections 2(a) (6), Title III of the Second War Powers Act (56 Stat. 176, 50 U.S.C. App. 633) Section 7(a) and 7(c) of the Veterans Emergency

Housing Act of 1946 (60 Stat. 207, 50 U.S.C. App. Sec. 1821 et. seq. and Section 24 of the Judicial Code (54 Stat. 143, 28 U.S.C. 1345).

The jurisdiction of this Court is conferred by Sec. 1291, Title 28, U.S.C.

PRELIMINARY STATEMENT

This is an appeal from a judgment of dismissal entered by the United States District Court for the Western District of Washington, Northern Division, in a Veterans Housing case, without trial and after argument and submission on appellees' motion to dismiss.

This civil action was brought by the United States of America under the provisions of Section 2(a) (6), Title III of the Second War Powers Act (56 Stat. 176, 50 App. U.S.C. 633), Sections 7(a) and 7(c) of the Veterans Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. App. Sec. 1821 et seq.) and Section 24 of the Judicial Code (54 Stat. 143, 28 U.S.C.A. 41). The action was brought to require the appellees to make restitution of overcharges above the maximum ceiling price set by the Federal Housing Administration in violation of priorities Regulation 33, issued pursuant to the Veterans Emergency Housing Act of 1946, *supra*.

Under the provisions of Title III of the Second War Powers Act of 1942, as amended, (56 Stat. 176, Title 50 App. U.S.C.A., Section 633) and Executive Orders issued thereunder, the Civilian Production Administration issued Priorities Regulation 33, effective January 16, 1946. Subsequently, on August 27, 1946, the Housing Expediter in Housing Expediter Priorities Order 1 (11 F.R. 9507) delegated to the Civilian Production Administration, the priorities and allocation powers contained in Sections 4 and 7 of the Veterans Emergency Housing Act of 1946. The Civilian Production Administration exercised such powers in the issuance of amendments to Schedule A of Priorities Regulation 33, and said regulation was, by virtue of said amendment, after August 27, 1946, continued in effect under the authority of both the Second War Powers Act of 1942, as amended, and the Veterans Emergency Housing Act of 1946. Subsequently, pursuant to the provisions of Housing Expediter Priorities Order 5, effective April 1, 1947 (12 F.R. 2111) and Executive Order 9836 (11 F.R. 1939), the Housing Expediter continued in effect said Priorities Regulation 33 under the Veterans Emergency Housing Act of 1946 above, until December 31, 1947.

When, pursuant to the provisions of Priorities Regulation 33, the appellees made application for pri-

orities assistance in securing materials to construct the dwellings mentioned in the complaint, they covenanted that they would sell the said dwellings at or below the maximum sales prices approved by the Federal Housing Administration. . .

Thereafter, these dwellings were constructed under the regulation and were sold to the two individuals mentioned in the complaint while the regulation remained in effect. The dwellings were sold at prices in excess of the approval maximum sale prices (\$1750.00 each in excess).

Appellant's complaint, which prays for restitution for the amount of the overcharges, is a suit brought by the Government, the nature of which is to enforce compliance on the part of appellees and to compel appellees to repay that which has been illegally acquired.

THE MOTION TO DISMISS

The motion to dismiss was on the following grounds:

1. That the complaint fails to state facts sufficient to constitute a cause of action.
2. That the Court does not have jurisdiction of the parties nor the subject matter.
3. That the plaintiff is not entitled to the relief prayed for or any relief.

4. That the action was not commenced within the time limited by law. (R. 12a)

The District Court neither rendered an oral nor written opinion, but merely announced that appellees' motion was granted, after having taken it under advisement, so we are without benefit of the trial court's views in the matter, except we may say that during oral argument on the motion, the court expressed himself of the belief that the Government had no right to maintain such an action and refused to follow the ruling of the late Judge Black in similar proceedings had in the Northern Division of the Western District of Washington, who had previously denied such motions to dismiss.

For the purposes of the motion, all of the well pleaded facts are admitted, as of course so that we have here nothing but questions of law.

The District Court entered judgment September 12, 1950, which, in part, reads:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants' motion for dismissal filed herein should be and the same is hereby granted; and the above entitled action and all causes of action therein set forth be and the same are hereby dismissed." (R. 11)

Notice of appeal was filed November 10, 1950. (R. 12).

STATEMENT OF THE CASE

Appellees A. A. See and C. M. Costner are co-partners, doing business as Costner & See at Renton, King County, Washington, and on May 22, 1946, made written application to the United States Production Administration, on a printed form for that purpose, under Priorities Regulation 33, as amended, Veterans Emergency Program for the construction of two five-room dwellings, including garages, to be constructed by them on Tract 9, Highland Addition to the Town of Renton, to be sold to veterans of World War II at the maximum sales price per complete unit, including the land of \$6,750.00 each, furnishing at said time outline specifications to the Federal Housing Administration. The application was granted August 26, 1946, by the Federal Housing Administration, and Priority No. 88-127-033 was assigned thereto, which priority was acknowledged in writing by appellee A. A. See, September 9, 1946, and thereafter and on September 16, 1946, said construction was inspected by a representative of the F. H. A. and at that stage approved.

For its first cause of action appellant alleged in the complaint that on the 11th day of February, 1947, an agent of appellees entered into an agreement in writing with one Lovell S. Sherin, a veteran qualified

to purchase by the terms of which, subject to the approval of the owners, appellees herein, Sherin paid to said agent the sum of one hundred dollars, earnest money, and appellees thereupon agreed to sell, and Sherin agreed to buy from appellees, one of the dwelling houses mentioned for the sum of eight thousand five hundred dollars, the dwelling in question being located on the North 45 feet of the South 90 feet of Tract 9, Highland Addition to the Town of Renton, the terms of sale being one thousand dollars down payment (including the \$100.00 earnest money), balance of seven thousand five hundred dollars, subject to approval of a G. I. loan; seller (appellees) to complete construction of the house in accordance with the terms set forth on the reverse side of said earnest money receipt, which terms were:

“Seller to complete garage, build walkways, and front and back entrance to sidewalks. Furnish shades for entire house. Furnish light fixtures for entire house. Build a rockery in front of the house and place oil tanks underground. Backfill to be graded to level with top of basement stairwell. Repair basement and waterproof same. Build small overhead porch over front steps.” (R. 3)

That appellees approved the sale by affixing their respective signatures to said earnest money receipt, well knowing at said time that the maximum price they could lawfully charge and receive for this prop-

erty was the sum of six thousand seven hundred and fifty dollars.

The complaint further alleges that through the Renton Branch, People's National Bank of Washington, a G. I. loan of seven thousand five hundred dollars was negotiated and obtained by Lovell S. Sherin, the veteran, being V. A. Loan No. 1015, which sum, together with one thousand forty-six dollars, furnished by Sherin, was paid over to Wallin & Edwards, as agents for appellees, and appellees delivered to Sherin a statutory warranty deed to the premises described, which was duly recorded in the office of the Auditor of King County, Washington, under Auditor's fee No. 3679578, March 27, 1947, and recorded in Vol. 2614 Deeds, page 492, and a mortgage on said premises was executed by Sherin and wife for the sum of seven thousand five hundred dollars.

It is further alleged in the complaint that said sale was consummated in violation of the maximum sale price fixed by the Federal Housing Administration and Priorities Regulation 33, in that the sale price so charged and received exceeded the maximum sale price by the sum of one thousand seven hundred and fifty dollars, in which sum appellant sought restitution for the benefit of said veteran.

The second cause of action alleges similar facts

in connection with the sale of the other house, on which the same maximum sales price was fixed. The sale being to one Robert Collins, a veteran of World War II, on the 27th of February, 1946, covering the South 45 feet of Tract 9, Highland Addition to the Town of Renton, the terms of sale being the same as the sale to Sherin, and the overcharge being in a similar amount.

The prayer of the complaint was as follows:

1. On its first cause of action, for the benefit of Lovell S. Sherin, restitution in the sum of \$1750.00.
2. On its second cause of action, for the benefit of R. W. Collins, restitution in the sum of \$1750.00.
3. For its costs and disbursements and such other and further equitable relief as to the Court seems meet and proper. (R. 9)

To this complaint appellees interposed a motion to dismiss (R. 8-9) upon the following grounds:

1. That the complaint and each separate cause of action therein fails to state sufficient facts to constitute a cause of action against defendants.
2. The Court does not have jurisdiction of this action or the subject matter.
3. That the plaintiff is not entitled to the relief prayed for, nor entitled under the law to maintain said action.
4. That this action and each separate cause of

action therein, being for the benefit of private individuals therein named, is banned by the applicable Statute of Limitations and has not been brought within the time limited by law; which appears from the allegations of the complaint.

This motion is based upon the files and records herein and is made pursuant to Rule XII Federal Rules of Procedure. (R. 12a)

ASSIGNMENT OF ERRORS AND STATEMENT OF POINTS

1. The District Court erred in granting defendants' motion to dismiss and entering an order of dismissal because:

(a) The Court has jurisdiction of both the parties and the subject matter.

(b) The complaint states a cause of action entitling the plaintiff to the relief prayed for.

ARGUMENT

Section 2(a) (6), Title III of the Second War Powers Act provides:

"The district courts of the United States * * * have jurisdiction of violations of this subsection (a) or any rule, regulation, or subpoena thereunder, whether heretofore or hereafter issued, and of all civil actions under this subsection (a) to enforce any liability or duty created by or to enjoin any violation of this subsection

(a) to enforce any liability or duty created by or to enjoin any violation of this sub-section (a) or any rule, regulation, order or subpoena thereunder whether heretofore or hereafter issued."

Section 7(a) of the Veterans Emergency Act of 1946, provides:

"Whenever, in the judgment of the Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of Section 5 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Expediter that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order, may be granted, and if granted shall be granted without bond."

These sections are parallel in scope and the language to Section 205(a) of the Emergency Price Control Act of 1942, as amended. (50 App. U.S.C., Sec. 925(a).

It is charged by appellant that the defendants (appellees) sold these two dwellings at prices in excess of the approved maximum sales prices.

The motion to dismiss is based upon the denial by appellees, concurred in by the District Court, that the Government has a right to institute the action, and, moreover, even if so, said action is barred by

limitation and particularly in view of the fact that the Government is asking that restitution be made of the overcharges in each case to the purchaser.

The motion, on this ground, should have been denied for the reason that under all authority, the Government is a proper party and is here in its sovereign capacity to compel the performance of duties or the carrying out of obligations in the public interest, and it is a familiar doctrine that limitation bars do not run against the Government. Moreover, in analogous cases the Courts have so held.

Virginia R. Co. v. System Federation, 300 U.S. 515;

Hecht Co. v. Bowles, 321 U.S. 321, 329.

Under this broad, equitable jurisdiction, the Supreme Court of the United States has held that an order granting restitution of overcharges to the purchaser is a proper exercise of the statutory authority. In *Porter v. Warner Holding Company*, 328 U. S. 395, the Court, in a case involving restitution of excessive rents under the Emergency Price Control Act, stated that such an order is proper either as an equitable adjunct to an injunction decree or "as an order appropriate and necessary to enforce compliance with the Act." In defining the scope of this jurisdiction, the Court said, on page 400, that:

“Section 205 (a) anticipates orders of that character, although it makes no attempt to catalogue the infinite forms and variations which such orders might take. The problem of formulating these orders has been left to the judicial process of adopting appropriate equitable remedies to specific situations. *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194. In framing such remedies under Sec. 205(a) courts must act primarily to effectuate the policy of the Emergency Price Control Act and to protect the public interest while giving necessary respect to the private interests involved. The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. *Clark v. Smith*, 13 Pet. 195, 203. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purpose.”

The applicability of the above quoted language to the housing regulations and statutes has been sustained in cases where the courts ordered restitution of overcharges in the sale of veterans houses obtained in violation of Priorities Regulation 33. *United States v. Carter*, 171 F. (2d), 530.

Restitution may be granted independently of an injunction prohibiting further violations and thus, the fact that the sales price ceiling has been removed or that the statute has expired does not preclude the issuance of a restitution order. *Bowles v. Skaggs*,

151 F. (2d) 817; *United States v. Carter*, supra; *Nesseth v. Creedon*, 80 F. Supp. 269.

The one-year statute of limitations in Section 7 (d) of the Veterans Emergency Housing Act of 1946 does not apply to a suit by the Government for restitution under Section 7(a).

The Second War Powers Act contains no limitation of time for bringing a suit to enforce a liability under the Act.

Keele v. Holt, 171F. (2d) 480.

Section 7(d) of the Veterans Emergency Housing Act of 1946 sets up a one-year statute of limitations for suit by a purchaser for overcharges. This is parallel to the one-year statute of limitations in Section 205(e) of the Emergency Price Control Act of 1942, as amended.

The fact that Section 7(d) of the Veterans Emergency Housing Act, as Section 205(e) of the Emergency Price Control Act, authorizes an aggrieved purchaser to sue, within the statutory period, to recover the amount of the overcharge, does not conflict with the granting of a restitution order in a suit initiated by the Government. These sections establish the means whereby individuals may assert their private right to damages in an action at law and in no way

conflict with the jurisdiction of a court of equity under Section 7(a) and Section 205(a) of these statutes, to issue such other orders as may be necessary to vindicate the public interest and to compel compliance with the statute. *Porter v. Warner Holding Company, supra*. An order of restitution is not a judgment for damages or for penalties and is not inconsistent with these remedies. It compels compliance and requires restoration of the *status quo* which falls within the recognized power of a court of equity. *Bowles v. Skaggs, supra*.

And the fact that an action for damages by a purchaser as a result of an overcharge may be barred in a suit at law does not preclude a court from granting restitution under its equity powers in a suit by the Government. *Creedon v. Randolph*, 165 F. (2d) 918.

In *Blood v. Fleming*, 161 F. (2d) 292, which was an action for restitution brought under Section 205 (a) of the Emergency Price Control Act, the Court said:

“The limitations upon the powers of the Court to proceed under the provisions of this Section are governed by equitable considerations. Whether an action may be maintained under this Section is not controlled by the one-year limitation set up in Section 205(a).”

Thus, it is clear that the one-year statute of limitations set up for actions at law in Section 7(d) of the Veterans Emergency Housing Act of 1946, in no way limits the Government in an action for restitution in equity under Section 7(a). See also *Creedon v. Randolph, supra*.

In bringing this action under Section 7(a) of the Veterans Emergency Housing Act of 1946, the United States is not suing on behalf of the purchasers.

The United States is the real party in interest. The action is one which has been brought in the public interest, to enforce obligations running from the appellees to the Federal Government and to compel compliance with a Federal regulation and statute pursuant to which the regulation was in effect. The duty and responsibility which the appellees assumed in the construction of houses pursuant to a priorities application has been described as being in the nature of a contractual obligation to the Government. *United States v. Duke Building Corp.*, 79 F. Supp. 681. The fact that, under the statutory scheme, it was intended that certain benefits would inure to veteran purchasers of priority-constructed houses, does not make this a suit brought on behalf of third parties.

As was said by the Court in *Creedon v. Randolph, supra*, in a suit under a provision of the Emergency

Price Control Act which is substantially identical with the language of Section 7(a) of the Veterans Emergency Housing Act:

“The remedy invoked under Section 205(a) appertains only to the Administrator as the representative of the Government in the enforcement of this law. That to require restitution of overcharges tends to enforce the law prohibiting them, no one would deny. That it operates to confer a benefit on the tenant, who has not seen fit to act in her own behalf, does not detract at all from the enforcement effect nor alter its nature.”

Since the United States is acting in its own interest in maintaining this suit, the claim that the one-year period of limitation within which suit may be instituted by a purchaser under Section 7(d) is applicable to the instant case is without merit. While the action under Section 7(d) is an action at law, the instant one under Section 7(a) is a suit in equity. The United States Supreme Court in the case of *United States v. Beebe*, 127 U.S. 338, 344, said this:

“The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest is established past all controversy or doubt.”

The United States may bring the action as plain-

tiff without joining the purchasers as necessary parties.

It is a long established rule that when the United States acts through the agency of a wholly owned corporation, it may sue in its own name without the joinder of the corporation.

In *Fleming v. Baum*, *supra*, the Administrator of the Office of Temporary Controls, a predecessor of the Housing Expediter, brought an action for restitution of overcharges obtained in violation of Priorities Regulation 33. A motion was made to substitute the United States of America in lieu of the Administrator. In granting the motion, the Court said:

“The motion to substitute the United States of America as party plaintiff in lieu of Philip B. Fleming, Administrator of the Office of Temporary Controls, should be granted. The United States is a juristic person in the sense that it has capacity to sue upon contracts made with it or in vindication of its property rights (*United States v. Cooper Corporation*, 312 U.S. 600, 604). The powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. (*Cotton v. United States*, 11 How. 229, 231, following in *United States ex rel Marcus v. Hess*, 317 U.S. 537, 550).

The United States may substitute itself in place of any agent or agency acting on its behalf whether a corporation or individual. It seems well settled that when the United States acts through the agency of a wholly owned corporation, it may sue in its own name for the protection of its interests, without the joinder of the corporation. (*Insurance Company of North America v. United States*, C.C.A. 4, 159 F. (2d) 699, 702; see also *United States v. Summerline Ancillary Administratrix*, 310 U.S. 414)."

Many cases have sustained the right of the United States to sue in its own name under the housing statutes and regulations for restitution of overcharges without joining the purchasers as parties plaintiff.

United States v. Carter, supra;

United States v. Duke Building Corporation, supra;

United States v. Tyler Corporation;

See also *Porter v. Warner Holding Co., supra.*

The District Court, therefore, erred in granting appellees' motion to dismiss and its judgment should be reversed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

Office and Post Office Address:
1017 U. S. Court House
Seattle, Washington

No. 12765.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY WALTER ADAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

SAMUEL REISMAN, and
BERTRAM H. ROSS,

712 Citizens National Bank Building, Los Angeles 13,
Attorneys for Appellant,

TOPICAL INDEX.

	PAGE
Preliminary statement	1
Statement of facts.....	2
Argument	9

I.

The alleged perjury of appellant was not proved by the testimony of two witnesses, or one witness and corroborating circumstances, as required by law.....	9
--	---

II.

That appellant was prejudiced by having the jury instructed that they could consider the indictment in Case No. 21101 for the purpose of determining whether appellant's testimony before the Grand Jury was knowingly and wilfully perjurious	15
--	----

III.

That appellant was prejudiced by having the jury receive instructions from a jury handbook in the jury room outside of the presence of appellant.....	20
Conclusion	28

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Chitworth v. United States, 178 Fed. 442.....	19, 20
Cook v. United States, 26 App. D. C. 427.....	12
Fina v. United States, 46 F. 2d 643.....	23
Fotie v. United States, 137 F. 2d 831.....	12
Fraser v. United States, 145 F. 2d 145.....	11
Hart v. United States, 131 F. 2d 59.....	12
Little v. United States, 73 F. 2d 861.....	23, 28
Mattox v. United States, 146 U. S. 140.....	23
Ogden v. United States, 112 F. 2d 523.....	23
Outlaw v. United States, 81 F. 2d 805.....	23
Pawley v. United States, 47 F. 2d 1024.....	11
People v. Woodcock, 52 Cal. App. 412.....	12
Phair v. United States, 60 F. 2d 953.....	12
Sullivan v. United States, 161 Fed. 253.....	12
United States v. Douglas, 155 F. 2d 894.....	23
United States v. Seavely, 180 F. 2d 837.....	12
Weiler v. United States, 323 U. S. 606.....	11, 12
Wilkerson v. State, 55 S. W. 49.....	12
Wright v. State, 30 Okla. Cr. 425, 236 Pac. 633.....	13

STATUTES

Rules of Criminal Procedure, Rule 29.....	8
---	---

No. 12765.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY WALTER ADAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Preliminary Statement.

Appellant was convicted of the crime of perjury in the District Court of the United States for the Southern District of California based upon an indictment charging that he committed perjury when he testified before the United States Grand Jury that he was in the barber shop on Sunset Boulevard near Laurel Canyon in the City of Los Angeles on February 28, 1950 [Clk. Tr. p. 2]. Said indictment alleged that one Abraham Davidian was a co-defendant in Case No. 21101, pending in said United States District Court, and that said Davidian, who was a Government witness in said case, was murdered on February 28, 1950, in Fresno. The Government's theory of materiality [Rep. Tr. p. 18] was that appellant had a motive to falsely testify before the Grand Jury in its

inquiry into a possible obstruction of justice, for the said Abraham Davidian was to be a Government witness in Case No. 21101 in which this appellant was also a co-defendant.

Statement of Facts.

In analyzing the facts upon which the conviction is based, we shall only refer to the testimony most favorable to the Government. The appellant vigorously denied the charge and produced a number of witnesses to establish the truth of his testimony before the Grand Jury to the effect that he was in the barber shop on February 28th in accordance with his testimony before the Grand Jury. In that this testimony was rejected by the jury, we shall not reargue before this court matters that were resolved against the appellant by the jury and by the trial judge on his denial of appellant's motions for acquittal, directed verdict and new trial. We desire, however, at this time to point out to the court that the testimony in the trial court was in sharp conflict. This should be borne in mind, for any errors would of necessity be prejudicial to appellant.

To establish its charge of perjury, the Government caused appellant's testimony before the Grand Jury, which was given on August 10, 1950 [Rep. Tr. p. 24] to be read to the jury [Rep. Tr. p. 32]. Thereupon, the Government called Erwin Sharpe, who testified he was a barber; that he was employed in his brother's barber shop at 8021 Sunset Boulevard, in Los Angeles, California, which is close to the corner of Laurel Canyon [Rep. Tr. p. 38]; that he was acquainted with the appellant, and that during the early part of 1950 he had cut appellant's hair on two occasions [Rep. Tr. p. 40]. *He said that the first occa-*

sion that he had cut his hair *was* some time in February, 1950 [Rep. Tr. p. 40]. He further testified that the barber shop had four chairs and that he serviced the third chair from the front of the shop [Rep. Tr. p. 41]. That the first occasion that appellant had been in the barber shop was in the late evening about 5:30 P. M. [Rep. Tr. p. 41] and that at the time appellant first came into the shop his brother, George Sharpe, serviced the first chair, and that the second chair was being serviced by Frank Riggi [Rep. Tr. p. 41]; that on this first occasion that appellant came to the barber shop he had a little dog with him. When asked to fix the date, this witness stated that the first visit of appellant to the barber shop was on Thursday, February 28 [Rep. Tr. p. 43]. A calendar was then shown to the witness [Rep. Tr. p. 44] and the court stated that it would take judicial notice of the fact that February 28th was a Tuesday and March 2nd was a Thursday. The witness thereupon stated that the first visit of appellant to the shop must have been on Thursday, March 2nd [Rep. Tr. p. 44]. To this the witness said that he was sure. After a short recess [Rep. Tr. p. 45], the witness was further interrogated and testified that he recalled that he was off on March 1st.

On cross-examination, this witness testified that appellant made a further visit to the barber shop about a week after the first visit [Rep. Tr. p. 47] and made a third visit to the barber shop about a month after the second visit [Rep. Tr. p. 48], and that on said third occasion he had again cut appellant's hair. On this third visit appellant had with him some private investigators [Rep. Tr. p. 50] and there was considerable testimony as to the conversations between the private investigators and this

witness [Rep. Tr. p. 41]. This witness further testified that on the first occasion of appellant's visit to the barber shop, the radio program "Life with Luigi" was not on [Rep. Tr. p. 54], but that the Gabriel Heater newscast was tuned in on the barber shop radio [Rep. Tr. p. 55]. It is interesting to note that this witness testified that on appellant's second visit to the barber shop the radio program "Life with Luigi" was turned on, and that appellant remained to hear the end of the program [Rep. Tr. p. 80].

It is also interesting to note that the witness previously testified that the second visit was approximately one week after the first visit. At this time we also point out that the testimony of the witness Francis William Beckinsale, the Service Manager of the Columbia Broadcasting Company, clearly disclosed that the "Life with Luigi" program was regularly broadcast during the time in question, on Tuesday nights from 6:00 to 6:30 o'clock, P. M. Thus, if the second visit made by the appellant to the barber shop was one week after the first visit, and the "Life with Luigi" program was being played on the radio in the barber shop at the time of the appellant's second visit, it is reasonable to assume that appellant first visited the barber shop on a Tuesday, rather than a Thursday. We are not attempting to re-try this case before this Honorable Court nor to ask the court to usurp the functions of the jury which has already resolved the conflicts and testimony, but we point out these details to indicate how unsatisfactory the Government's witnesses were so that we may urge that as a matter of law there was no definite, certain and clear testimony before the jury from which it could possibly arrive at a verdict of guilty. It is appel-

lant's position that the record is devoid of the necessary quantum of proof to support the perjury conviction.

To summarize the testimony of the witness Erwin Sharpe, the witness testified that the first occasion when he cut the appellant's hair in the barber shop was some time in February, 1950. Then the witness testified that Adams was in the barber shop for the first time on Thursday, February 28, which he later changed to March 2nd; that Adams returned to the barber shop about a week later and made a third visit about a month later. He testified that on the occasion of the third visit Adams had two investigators with him, Messrs. Kliman and Panneno; that on the first visit appellant made to the barber shop the Gabriel Heater news program was on the air, and not the program, "Life with Luigi," but that on Adams' second visit to the barber shop, made a week after the first visit, the program "Life with Luigi" was being heard on the barber shop radio.

The next witness called by the Government was George Sharpe, who testified that he was the owner of the barber shop at 8021 Sunset Boulevard in Los Angeles [Rep. Tr. p. 88] and that there are four chairs in the barber shop, but only three serviced by barbers; that he, George Sharpe, handled the first chair, that Frank Riggi serviced the second chair, and that his brother, Erwin Sharpe, was at the third chair. He testified that the first time appellant was in the barber shop was on March 2nd [Rep. Tr. p. 89] and that that was a Thursday, and that both Frank Riggi and Erwin Sharpe were there on that day; that appellant received a hair cut from Erwin Sharpe at about 5:30 o'clock in the evening [Rep. Tr. p. 90]. *This witness testified that he was not in the shop on*

February 28, 1950, as that was his day off, and that February 28 was a Tuesday [Rep. Tr. p. 90]. This witness testified that he did not know whether appellant was in the barber shop or not on February 28 [Rep. Tr. p. 91]. This witness fixed Thursday as the day upon which appellant was in the barber shop by drawing an inference [Rep. Tr. p. 115]. He said he wasn't there on Tuesday, and his brother, Erwin, wasn't there on Wednesday, so it must have been Thursday or Friday [Rep. Tr. p. 115]. This witness also testified that appellant was in the barber shop a short time after the first visit [Rep. Tr. p. 122], and that there was also a third visit. This witness also testified that on one of appellant's visits to the barber shop the program "Life with Luigi" was turned on [Rep. Tr. p. 133]. This witness also testified that the "Life with Luigi" program was heard prior to the Gabriel Heater program on the same radio station, KNX [Rep. Tr. p. 138].

We specifically direct the court's attention to this witness's obviously incorrect testimony in connection with the times and stations on which the two radio programs, *i.e.*, "Gabriel Heater" and "Life with Luigi," were broadcast, merely for the purpose of demonstrating the uncertainty and confusion existing in this witness's mind. We further desire to point out that this witness added nothing to the testimony of Erwin Sharpe, as his only means of fixing the time or times that Adams was in the barber shop was by his own process of mental dead-reckoning. He testified that he was not in the barber shop on Tuesday, so, therefore, Adams had to be there on Thursday or Friday, but this witness clearly stated that he had no

personal knowledge of whether or not Adams was in the barber shop on Tuesday, February 28.

To summarize this witness's testimony, he said that he did not know whether or not Adams was in the shop on February 28th, as that was his day off; that he recalled Adams' being in the shop on Thursday or Friday, being serviced by his brother, Erwin Sharpe, and that he fixed the day as a Thursday or Friday because he was off on Tuesday and Erwin was off Wednesday. He also testified that appellant was in the barber shop on two other occasions and that on one of these occasions the program "Life with Luigi" was being broadcast in the barber shop.

The Government thereupon called Frank Riggi, who testified that he was employed as a barber in the barber shop at 8021 Sunset Boulevard [Rep. Tr. p. 144], and that he serviced the second chair and his employer, George Sharpe, handled the first chair, and that the third chair was serviced by Erwin Sharpe [Rep. Tr. p. 143]. He said that he recalled that the first time appellant was in the shop it was late in the afternoon and that Erwin Sharpe cut his hair, and that George Sharpe was present on said date; that appellant had a little dog with him at the time [Rep. Tr. p. 144]. That he recalled appellant being in the barber shop for the second time when he cut appellant's hair [Rep. Tr. p. 145], *but that he could not fix the date* [Rep. Tr. p. 145]. *The witness further testified, in response to the questioning of the court, that he could not remember the day of the week or the date that appellant was in the barber shop for the first time* [Rep. Tr. p. 145].

To summarize this witness's testimony, he merely testified that he saw the appellant in the barber shop on two

occasions, on one of which Erwin Sharpe cut his hair, and on the second occasion this witness cut appellant's hair. *His testimony is completely negative as to days or dates when appellant was in the barber shop.*

Thereupon Indictment No. 21101 was received in evidence *over the objection of appellant* [Rep. Tr. p. 147]. It was thereupon stipulated that Abraham Davidian was to be a witness for the Government in Case No. 21101, and that he died by violent means on February 28, 1950 [Rep. Tr. p. 149].

The foregoing constituted the Government's case, and at the close thereof a motion was made for a judgment of acquittal pursuant to Rule 29 of the Rules of Criminal Procedure [Rep. Tr. p. 151], which motion was denied by the court [Rep. Tr. p. 153].

The other evidence introduced at the trial consisted of the defendant's testimony in which he asserted that he was in the barber shop on the date he testified that he was there before the Grand Jury [Rep. Tr. p. 154], and the testimony of his corroborating witnesses, whose testimony will not be adverted to, as had it been believed, appellant would have been acquitted by the jury. We do, however, want to point out the testimony given by Francis William Beckinsale, Service Manager of the Columbia Broadcasting Company [Rep. Tr. p. 229], who testified that the program "Life with Luigi" during the times in question in this case was released *weekly over radio station KNX on Tuesday from 6:00 to 6:30 o'clock, P. M.* [Rep. Tr. p. 234], *and that the Gabriel Heater program is not released by KNX but is released through the Mutual Broadcasting Company* [Rep. Tr. p. 233].

ARGUMENT.

We shall divide our argument into three phases:

- (a) That the alleged perjury of appellant was not proved by the testimony of two witnesses, or one witness and corroborating circumstances, as required by law.
- (b) That appellant was prejudiced by having the jury instructed that they could consider the indictment in Case No. 21101 for the purpose of determining whether appellant's testimony before the Grand Jury was knowingly and wilfully perjurious.
- (c) That appellant was prejudiced by having the jury receive instructions from a jury handbook in the jury room outside of the presence of appellant.

I.

The Alleged Perjury of Appellant Was Not Proved by the Testimony of Two Witnesses, or One Witness and Corroborating Circumstances, as Required by Law.

The court will note that we carefully parsed the testimony of the three barbers, since it is the only testimony touching upon the alleged perjury. *The Government's case must rise or fall upon the said evidence.* Apparently the Government regards the testimony of Erwin Sharpe as the direct testimony to establish the perjury. It should be borne in mind that the charging part of the indictment is that appellant was guilty of perjury by falsely testifying before the Grand Jury that he was at a particular barber shop on Sunset Boulevard on February 28, 1950. The date is of the utmost importance, for the testimony clearly

establishes that he was in the barber shop on three occasions, so as a matter of law the date cannot be disregarded. *Therefore, it was the duty of the Government to establish either by two direct witnesses or one witness and corroborating circumstances that appellant was not in the barber shop on February 28, 1950.* We submit that the Government fell far short of this kind of proof. Erwin Sharpe did not testify that appellant was not in the barber shop on February 28th. In fact, he testified *in direct examination* that he first cut appellant's hair some time in February, and that appellant was in the barber shop on February 28th [Rep. Tr. p. 43], and then attempted to correct his testimony that it was on a Thursday that appellant was in the barber shop, and by use of the calendar reached the conclusion that it was Thursday, March 2nd. He further testified that appellant was in the barber shop a week later, and then a month later [Rep. Tr. pp. 48 and 50]. Now, if we accept this as direct testimony that appellant was not in the barber shop on February 28th, which is rather difficult upon a fair reading of the record, is there more than one witness who directly testified that appellant was not in the barber shop on February 28, 1950? The answer to this query is obviously and emphatically in the *negative*, because George Sharpe testified that he did not know who was in the barber shop on February 28th, as that was his day off [Rep. Tr. p. 91]. Further, Frank Riggi could give no direct testimony, as he was completely unfamiliar with days or dates [Rep. Tr. p. 145].

Thus, by the simplest processes of deduction, the best that the Government can claim is that it has one witness to the perjury. This we even question in view of the

uncertain character of Erwin Sharpe's testimony as to dates. Assuming, for the purpose of this argument, that Erwin Sharpe's testimony directly established perjury, was it in any way corroborated? Certainly, Riggi's testimony constituted no corroboration, because he could fix no dates. *By drawing an inference from an inference*, the best that Riggi's testimony establishes was that all three barbers were on duty when appellant came into the barber shop. This cannot be the basis of corroboration, as will be hereafter pointed out in the citation of authorities. Also, George Sharpe certainly does not corroborate that appellant was not at the barber shop on February 28th, since he was not there that day and didn't know who was in the barber shop; and his testimony that the appellant must have been in the shop on Thursday or Friday is wholly unsatisfactory since it is based on the inference that since he, George Sharpe, wasn't there on Tuesday, and his brother, Erwin, wasn't there on Wednesday, it must have been Thursday *or Friday*.

We shall examine the authorities establishing the quantum of proof required in perjury cases and demonstrate that this case falls so short thereof that the conviction here before this court is shocking.

The law is quite clear that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused. The rationale of this rule seems to be that where you have two people taking diametrically opposed oaths, the oath of one cannot counteract the oath of the other.

Fraser v. United States, 145 F. 2d 145;

Weiler v. United States, 323 U. S. 606;

Pawley v. United States, 47 F. 2d 1024.

The law of perjury has ingrafted upon it the doctrine of corroboration so that if there are not two witnesses to the perjury, the testimony of one witness must be corroborated.

Weiler v. United States, 323 U. S. 606;

U. S. v. Seavely, 180 F. 2d 837;

Fotie v. United States, 137 F. 2d 831.

The troublesome question of law has always been that of corroboration. The following cases held that the corroboration was insufficient:

Fotie v. United States, 137 F. 2d 831;

Hart v. United States, 131 F. 2d 59;

Phair v. United States, 60 F. 2d 953;

Sullivan v. United States, 161 Fed. 253.

Corroborative testimony must raise more than a suspicion or opportunity to commit a crime. It must independently or any other evidence tend to connect the defendant with the commission of the offense.

People v. Woodcock, 52 Cal. App. 412, 418.

The rule definitely is that corroboration must offer proof of independent and material facts tending to establish the crime, and not mere corroboration in slight particulars.

Cook v. United States, 26 App. D. C. 427.

We desire to call the court's attention to two rather interesting cases. One is *Wilkerson v. State* (Tex.), 55 S. W. 49. There defendant was charged with having falsely testified that he did not have a pistol with him on a par-

ticular occasion. One person testified that defendant had a pistol with him. The person assaulted told his son that he had been attacked, and there was some evidence that defendant owned a pistol like the one used in the assault. There the court held that there was *no* legal corroboration.

Another interesting case is *Wright v. State*, 30 Okla. Cr. 425, 236 Pac. 633. There defendant was charged with having falsely testified he was not in a room at a time a murder had been committed therein. One witness testified that defendant was in the room at the time of the commission of the murder. Two other witnesses testified that they came into the room where the deceased lay and found the defendant therein. The court held that sufficient time had elapsed so that defendant need not have been in the room at the time of the commission of the offense and, therefore, held that the alleged perjury was not corroborated.

Applying the foregoing rules of law to the record here before the court, possibly one witness, viz., Erwin Sharpe, testified that defendant was not in the barber shop on February 28th. George Sharpe merely corroborated Erwin Sharpe to the effect that appellant was in the barber shop on Thursday, *but did not corroborate the essential ingredient that appellant was not in the barber shop on February 28th, for George Sharpe himself wasn't in the shop on that day. Riggi, the third barber, corroborates nothing, for he could not fix day or dates, and all three barbers definitely placed appellant in the barber shop on at least two, and possibly three, occasions.*

Were this court to weigh the testimony of the Government's witnesses, it would appear that all of their testimony is in sharp conflict. Erwin Sharpe testified that he gave appellant two haircuts. George Sharpe testified that Erwin gave Adams but one haircut, and Riggi adds his part to the confusion by claiming to have given Adams a haircut on one occasion. Add to this the utter confusion of the barbers in relation to the radio programs that were being heard on the various occasions when Adams was in the barber shop. The barbers not only had the radio programs on the wrong stations, but also were completely wrong as to the times when said programs were actually broadcast. While this court cannot weigh the testimony, it certainly can examine the record to find if there is any satisfactory testimony or proof of corroboration upon which the judgment of conviction is based.

We sincerely believe that there is a complete failure of testimony to establish any perjury, and there isn't any corroboration. While the Government may argue that the presence of three barbers is important, we submit that these are not items of corroboration. They might be extremely important if the appellant claimed that he was never in the barber shop, or that he had been there only once, but the perjury charged in this case relates solely and wholly as to whether or not he was there on February 28th, and that testimony must be corroborated. Search the record as we will, we find nothing except Erwin Sharpe's uncorroborated testimony that he believed that it was Thursday, February 28th, later changed to March 2nd.

II.

That Appellant Was Prejudiced by Having the Jury Instructed That They Could Consider the Indictment in Case No. 21101 for the Purpose of Determining Whether Appellant's Testimony Before the Grand Jury Was Knowingly and Wilfully Perjurious.

Among the various instructions by the court to the jury, there appears the following instruction:

"I particularly emphasize to you that you are charged with the duty only and solely of determining whether or not the defendant is guilty or is not guilty of the crime of having wilfully and knowingly committed perjury before the grand jury on August 10th, 1950 as set forth in the indictment in this case: The defendant is not on trial before you for any of the charges contained in indictment No. 21101; that indictment will not go to the jury room with you; and you must not consider the nature of the charges therein set forth; nor is the defendant on trial before you or charged with the murder of Abraham Davidian in this or any other Court or of any complicity therein; nor is he on trial or charged in this or any other court with obstruction of justice. You cannot and must not in your deliberations speculate as to his guilt or possible connection with any of these three things, but you must accept the presumption that he is innocent thereof.

"If, however, you find beyond a reasonable doubt, that he did testify falsely before the grand jury on August 10th, 1950 as charged, then, and then only, you may give consideration solely and only to the fact that indictment No. 21101 was returned against Adams and others before, and was pending on February 28th, 1950, and at all other times material to the

within charge of perjury, and to the fact that the grand jury was conducting a lawful inquiry on material matters on August 10th, 1950, in order for you to determine the state of mind of the defendant at the time of giving such testimony on August 10th, 1950, that is whether or not the defendant Adams, beyond a reasonable doubt, knowingly and wilfully intended to give such false testimony on August 10, 1950, before the grand jury." [Rep. Tr. p. 545 ff.]

In connection with the second paragraph of this instruction, it is the appellant's contention that the Court committed prejudicial error in so instructing the jury. Under this portion of the questioned instruction, the jury was told that they could consider the fact that the indictment in Case No. 21101 was returned against the appellant and others and was pending on February 28, 1950, and at all other times material to the within charge of perjury in passing upon the defendant's state of mind at the time he testified before the Grand Jury on August 10, 1950.

In connection with this instruction, which was given over the serious objection of appellant [Rep. Tr. pp. 499, 517], we direct the court's attention to the following facts:

1. The record in the instant case is entirely silent as to any connection between the appellant and the murdered Abraham Davidian, except that it would appear from the indictment No. 21101 that the appellant and Abraham Davidian, as well as numerous other persons, were co-defendants in said case.
2. Appellant Adams did not stand before the trial court charged with the murder of Abraham Davidian or with having any connection therewith, nor was he charged with or suspected of violating the Federal statutes relating to the obstruction of justice.

3. The record is entirely silent as to the time of day on February 28, 1950, when Abraham Davidian met his death in Fresno, California [Rep. Tr. p. 149].
4. This court, like the trial court, can take judicial notice of the distance between Fresno, California, and Los Angeles, California, and the time necessary to travel between the two cities by airplane, train, and/or automobile.
5. The indictment in the instant case was a catch-all to which appellant filed a motion to dismiss [Clk. Tr. p. 12], but the trial court at the time of trial limited the charging portion of the indictment to the sole issue as to whether Adams' testimony in relation to the barber shop incident was true or not.
6. Indictment No. 21101 charged the defendants named therein with violations of the Federal Narcotics Act, which charge had nothing to do with the instant perjury case. It is also interesting to note, even though it may be *dehors* the record, that since judgment was pronounced in this case Indictment No. 21101 has been dismissed.

With these uncontradicted facts in mind, we are at a loss to understand by what stretch of the imagination the trial court believed that it was permissible for the jury to consider the fact that the indictment had been returned in Case No. 21101 against the appellant and others. It would be just as logical for the Court to instruct the jury, were it a fact, that an indictment was pending against Adams in the Eastern District of Illinois for a violation of the Mann Act and that there was an indictment pending against Adams in the Western District of Missouri for a violation of the Income Tax laws. Obviously, the

last two mentioned examples would be prejudicial to the rights of the appellant, and we submit that the court's instruction in the instant case was even more so. At no time during the trial did the prosecution offer any evidence to show any motive on the part of the appellant to have murdered Abraham Davidian. Unless some such connection or motive was shown, there can be no excuse for the jury considering the indictment in Case No. 21101. Furthermore, it was extremely prejudicial for the jury to be told that they could consider pendency of an indictment the contents of which they did not know. For aught, said indictment could have charged Adams with any crime cognizable under any Federal law. The jury was thereby permitted to speculate and draw on its imagination as to the offense or offenses charged therein against the appellant.

In addition to the foregoing, we point out that at no time during the trial did the prosecution introduce any evidence as to the exact time of day on February 28, 1950, when Abraham Davidian was murdered in the City of Fresno. In view of this most important failure in the evidence, we are unable to see how or in what manner appellant's whereabouts at 5:00 or 6:00 P. M. on February 28th would be relevant or material to a grand jury investigation into a possible obstruction of justice in connection with the alleged murder of Abraham Davidian. If Davidian had been murdered at 8:00 A. M. on February 28th in the City of Fresno, it is entirely possible that a person could have made at least three or four round-trips by airplane between Fresno and Los Angeles by 5:00 or 6:00 P. M. on that day. Certainly, between 8:00 A. M. and 5:00 P. M. on the same day, a person can make a complete round-trip by train or automobile be-

tween Fresno and Los Angeles. We feel certain that the court will take judicial notice of these facts.

The connection between the Grand Jury's inquiry as to the whereabouts of appellant at 5:00 or 6:00 P. M. on February 28, 1950, and the murder of Abraham Davidian in Fresno at some unknown time on the same day, was never established during the trial of the instant case. Therefore, even assuming, but not conceding, that the appellant did not testify truthfully before the Grand Jury as to his whereabouts at 5:00 to 6:00 P. M. on February 28, 1950, wherein would such testimony be material in the instant case? The appellant does not stand charged with the murder of Abraham Davidian, nor was there any testimony offered in this case that he was a suspect in said murder, or, as we have previously pointed out, that he had a motive to murder the said Abraham Davidian in connection with the indictment in Case No. 21101, or otherwise.

In summation, appellant submits that the introduction into evidence of the indictment in Case No. 21101, and the court's instruction in connection therewith, as above quoted, could serve only to prejudice the jury against appellant, since the indictment could have no probative weight in enabling the jury to determine the appellant's state of mind at the time he testified before the Grand Jury. In effect, the challenged instruction constitutes a prosecution argument for conviction which could not have properly been made by the prosecuting attorney.

Before takning leave of this portion of our opening brief, we direct the court's attention to the case of *Chitworth v. U. S.*, 178 Fed. 442. That case was presented to the trial court in the instant case at the first mention by the prosecution of Indictment No. 21101, and while the

case is not on all four's with the instant case, it has great persuasive value and we believe that the court will gather a strong analogy when it examines the facts in the *Chitworth* case in relation to the instant case, and in particular to the point here under discussion. In view of the nature of the discussion in the *Chitworth* case, we will not attempt to paraphrase the same, but request that the court read the opinion in connection with its deliberations in the instant appeal.

III.

That Appellant Was Prejudiced by Having the Jury Receive Instructions From a Jury Handbook in the Jury Room Outside of the Presence of Appellant.

Following the return of the verdict in this case, appellant made his motion for a new trial and among the various grounds assigned for error, appellant urged therein:

“8. The jury received instructions outside of the presence of the defendant and the court after the case had been submitted to them for their deliberations in that the jury resorted to the use of unauthorized written means of ascertaining the law applicable to the case.” [Clk. Tr. p. 27.]

In support of this portion of said motion for new trial, the appellant presented the affidavit of juror J. J. Leach, which affidavit is found in the Clerk's Transcript beginning at page 29.

Before discussing this affidavit we point out that there were no answering or opposing affidavits filed by the prosecution that would in any way controvert or contradict juror Leach's affidavit. Therefore, it must be assumed for the purpose of this appeal that the facts con-

cerning the incidents mentioned in said affidavit are true and correct.

Since appellant considers the facts stated in the affidavit of juror J. J. Leach to be of the utmost importance in this case, and since said affidavit is relatively short, we have taken the liberty of quoting the entire affidavit herein, to-wit:

“UNITED STATES OF AMERICA
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES—SS

J. J. LEACH, being first duly sworn, deposes and says:

That he resides at 1037 Louise Street, Arcadia, California, and that he was one of the trial jurors in the case of United States of America v. Stanley Walter Adams, tried in the above entitled Court before Judge Peirson M. Hall.

That affiant states that after said case was submitted to the jury for its deliberations, your affiant, being one of the members of said jury, the jury retired to the jury room for its deliberations; that affiant states that upon entering the jury room your affiant observed present in the jury room four or five booklets entitled ‘A Handbook For Petit Jurors Serving in the District Courts of the United States’, a true and correct copy of which handbook is attached to this affidavit as Exhibit ‘A’, and made a part hereof.

That your affiant states that he personally saw and observed a number of his fellow jurors reading said handbook during the course of the jury deliberations and that certain paragraphs contained in said handbook were read aloud by one or more of the jurors to other members of the jury from time to time during the course of the jury deliberations.

That your affiant states that the aforesaid handbooks were present in the jury room and used during the jury deliberations on both December 5th and December 6th, 1950.

That affiant states that he makes this affidavit freely and voluntarily of his own will and desire, without any force, duress or coercion, and that no promises of any payment or reward of any kind have been made or offered to him in connection therewith by anyone whomsoever.

Further affiant saith not.

s/ J. J. Leach
Affiant"

[Clk. Tr. pp. 29, 30.]

Thus it clearly appears from this uncontradicted affidavit that after the jury retired for deliberation, the said juror observed present in the jury box four or five booklets or handbooks entitled "A Handbook For Petit Jurors Serving in the District Courts of the United States." In connection with this handbook we direct the court's attention to the fact that a copy of said handbook was attached to juror Leach's affidavit and appears in the Clerk's Transcript beginning at page 31. We will, in subsequent portions of this brief, specifically point out to the court the appellant's numerous objections to the prejudicial statements contained in said handbook. However, we specifically call to the court's attention the statement contained in the affidavit of J. J. Leach to the effect that said juror personally saw and observed a number of his fellow jurors reading said handbook aloud to other jurors during the course of the jury deliberations both on December 5th and December 6, 1950.

In connection with the law on this subject, we believe that the authorities are uniform to the effect that a jury cannot be instructed outside of the presence of the defendant.

Fina v. U. S., 46 F. 2d 643;

Outlaw v. U. S., 81 F. 2d 805;

Little v. U. S., 73 F. 2d 861.

It is also a well recognized rule of law that extraneous matters that have not been received in evidence cannot be considered by a jury in its deliberations.

U. S. v. Douglas, 155 F. 2d 894;

Ogden v. U. S., 112 F. 2d 523;

Mattox v. U. S., 146 U. S. 140.

In connection with the jury handbook in question, we do not want the court to feel that we are adverse to jurors being instructed generally in their duties at the time of their impanelment on the venire. This entire question has been litigated and relitigated, and we feel that jurors should be properly instructed generally in their duties at the commencement of their service on the venire. However, the vice and prejudice that occurred in the instant case was of an entirely different type and character. In this case the jurors actually considered and used, and even went so far as to read aloud from, the jury manual during the course of their deliberations in the jury room. It would have been the same kind of error had the jurors obtained or used a law book or a daily newspaper or sought to examine affidavits, or other documents that were not in evidence.

In the instant case we have a prosecution for perjury where the trial court very definitely by its instructions established the necessary quantum of proof and corrobor-

ation required for conviction. It is our firm belief that the pamphlet under discussion contains a number of statements in it which would have been prejudicial error had the same been included in the jury instructions given by the trial court. Therefore, for the purpose of determining the prejudice, if any, suffered by appellant herein, this court must necessarily consider the entire jury manual as additional instructions given to the jury. If the court should find that any portion of said manual would have been prejudicial as an instruction, it is then reversible error since it was considered by the jury during its deliberations.

Let us now turn to the jury handbook and point out the portions thereof which, in appellant's opinion and belief, constitute prejudicial error.

During the court's instruction to the jury, the court very properly instructed the jury that by the arrest of the defendant and the return of the indictment no presumption whatsoever arises to indicate that the defendant was guilty or that he had any connection or responsibility for the act charged against him [Rep. Tr. pp. 536-537]. However, notwithstanding this proper instruction, the following statements appear in the jury manual:

“ . . . The indictment is the formal charge or accusation of at least 12 out of a group of citizens of the district which may vary in number from 16 to 23 jurors, who generally are chosen in the same way petit jurors are selected but who, by reason of their number, are specially designated as a grand jury. The grand jury meets in secret session. The United States attorney, who is the Government's prosecuting official, presents his charges before the grand jury and produces evidence to substantiate the charges. If after hearing such evidence, the grand jury be-

believes that a crime has been committed and there is reasonable ground to believe that the defendant is responsible for the crime, it finds a true bill of indictment and presents it to the district court. These are technical phrases which mean that the grand jury believes that there is evidence which requires that the defendant be brought to trial on the charges set forth in the indictment . . .” [Clk. Tr. pp. 46, 47.]

* * * * *

“A grand jury in the Federal courts is a body of from 16 to 23 jurors, usually chosen in the same way as petit jurors, whose duty it is, in private session, to examine the accusations against persons charged with crime, and if they see just cause, then to find bills of indictment against such persons to be presented to the court.” [Clk. Tr. p. 60.]

The contrast between the court's proper formula instruction, above quoted, and the foregoing portions of the jury manual are most obvious. The effect of the above quoted portions of the manual upon the jurors reading the same in the jury room must of necessity tend to create prejudice against the appellant since the jury was specifically told that another tribunal had already found reasonable grounds to believe that the appellant was responsible for the crime as charged. This, of course, waters down the formula instruction that an indictment is a mere accusation and that the defendant is presumed to be innocent, to a mere shibboleth. Certainly, had the trial judge incorporated in his formula instruction the text of the manual above set forth, this court would without the peradventure of doubt reverse the judgment of conviction on this ground alone.

In addition to the above quoted prejudicial portions of the jury manual, we next direct the court's attention to the statement therein contained as follows:

“Thus it is that, in performing jury service, a citizen is called upon to render a duty second in importance only to a soldier who defends his country upon the field of battle.” [Clk. Tr. p. 36.]

Taking the foregoing text of the manual in connection with the comments we have made in relation to the function of a grand jury, the juror is led away from the instruction that he is a disinterested judge of the facts to a partisan position. By comparing the duties of jury service with that of a soldier defending his country upon the field of battle, certain fundamental emotional ties are played upon. The very caption of the case, to-wit: “United States of America v. Stanley Walter Adams,” necessarily tends to heighten such emotions and tendencies and likens the defendant to an enemy of the United States. We all know the part the historically patriotic American soldier has played in the history of our country, wherein we have always held to the doctrine “My country, right or wrong.” We could at far greater length dwell upon the vicious tendencies upon this type of statement being received and used by the jury in the jury room. Again, we state that had the trial judge included such language in his instructions there would be great prejudicial error as that language would completely dilute the instructions given to the jury that they are disinterested triers of the facts.

The next portion of the jury manual to which we want to direct the court's attention is in our opinion most prejudicial and undoes all of the instructions given by the trial court on the necessary proof in a criminal case and

the establishment of guilt beyond a reasonable doubt and to a moral certainty. As this court knows, proof in a perjury case is governed by special rules relating to corroboration. The trial court went to great length to define the special rules applicable to perjury cases. However, when we consider the following quoted portions of the jury manual in connection with this portion of the court's charge, it clearly appears that when the jury reached the jury room and entered its deliberations, it then had before it for use during such deliberations the following prejudicial statements of the law:

"What has been said about the procedure in the trial of civil cases, applies also in a general way to criminal trials." [Clk. Tr. p. 48.]

* * * * *

"The duty of a jury in trying a criminal case is very similar to its duty in a civil case." [Clk. Tr. p. 48.]

* * * * *

"Let us take now, for illustrative purposes, a typical civil case (we could as well take a criminal case, for the procedure, on the whole, is the same" [Clk. Tr. p. 38.]

Again, the effect of the quoted text from the jury manual is to water down if not completely negative all of the important constitutional instructions that were given by the trial judge in the case. To tell the jury that the procedure in civil and criminal trials is essentially the same certainly is contrary to the law and must of necessity tend to improperly influence the jury.

At this time we want to point out to the court that we don't know what portion of the jury manual was read

and considered by the jury and even if we did know it would be improper to consider the particular portion of the manual that was read in the jury room. It is our considered view that if any portion of the jury manual was improper or tends to confuse, negative or modify the court's instructions given in the presence of the appellant, then the motion for a new trial should have been granted as appellant was thereby prejudiced, and this court should properly reverse the judgment of conviction.

In closing this portion of appellant's brief, we direct the court's attention to the statement of the Circuit Court in the case of *Little v. United States*, 73 F. 2d 861, at page 866, wherein this court stated that the measure or nature of the prejudicial error required to justify reversal was as follows:

" . . . within the range of a reasonable possibility [it] may have affected the verdict of the jury, [and] appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. So to hold would, as a practical matter, take from a defendant his right to a fair trial."

Conclusion.

We again want to point out to the court that any error in the trial of the instant case must be regarded as prejudicial for the reason that the evidence was highly conflicting. Appellant steadfastly maintained that he had told the truth to the grand jury and produced a substantial number of corroborating witnesses to establish the truth of his testimony. While this testimony was rejected by the jury, this court should carefully scrutinize the testimony of the three barbers which we feel is not evidence of any kind because it is confused, contradictory within

itself and highly uncertain to the essential ingredient of the date here in question, *viz.* February 28, 1950. Add to this the other errors that we have pointed out and it is our sincere belief that more than error occurred at the trial—that there was a complete miscarriage of justice.

For the foregoing reasons, it is respectfully submitted that the judgment and order appealed from should be reversed.

SAMUEL REISMAN, and
BERTRAM H. ROSS,

Attorneys for Appellant,

No. 12765

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY WALTER ADAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

FILED

APR 30 1951

PAUL F. O'BRIEN,
CLERK

ERNEST A. TOLIN,

United States Attorney,

WALTER S. BINNS,

Chief Asst. United States Attorney,

600 U. S. Post Office and Court House
Building, Los Angeles 12, California,

Attorneys for Appellee.

TOPICAL INDEX

	PAGE
Statement of jurisdiction.....	1
Statement of the case.....	2
Questions in the appeal.....	2
The facts	3
Argument	5
There was sufficient proof to sustain the jury's verdict.....	5
Additional cases on the quantum of corroboration necessary....	6
The District Court did not err in its instructions.....	6
The District Court did not err in denying defendant's motion for a new trial.....	9
Conclusion	12

TABLE OF AUTHORITIES CITED

CASES	PAGE
Boehm v. United States, 123 F. 2d 791.....	6
Carroll v. United States, 16 F. 2d 651.....	8
Chipworthy v. United States, 178 Fed. 442.....	7
Colt v. United States, 190 Fed. 305.....	10
Glasser v. United States, 62 S. Ct. 457, 315 U. S. 60.....	4
Luce v. United States, 49 F. 2d 241.....	8
Mattox v. United States, 146 U. S. 140.....	9
Roberts v. United States, 50 F. 2d 871.....	10
Ulmer v. United States, 219 Fed. 641.....	8
United States v. Compagna, 146 F. 2d 524.....	10
United States v. Hiss, 185 F. 2d 822.....	5
United States v. Margolis, 138 F. 2d 1002.....	6
United States v. Palese, 133 F. 2d 600.....	6
United States v. Seavy, 180 F. 2d 837.....	6
Williamson v. United States, 207 U. S. 425.....	8

STATUTES

United States Code, Title 28, Sec. 1291.....	1
United States Code, Title 18, Sec. 1621	1, 2
United States Code, Title 18, Sec. 3231.....	1

No. 12765
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

STANLEY WALTER ADAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

Statement of Jurisdiction.

This is an appeal from a judgment of conviction rendered against appellant in the United States District Court for the Southern District of California, Central Division, upon a jury verdict finding appellant guilty of a violation of U. S. C., Title 18, Section 1621, perjury statute.

The indictment was in one count charging that defendant committed perjury in testifying before a regularly constituted grand jury for the Southern District of California on August 10, 1950. Appellant was sentenced to the custody of the Attorney General for imprisonment.

The District Court had jurisdiction under 18 U. S. C., Section 3231.

This Court has jurisdiction of the appeal under 28 U. S. C., Section 1291.

Statement of the Case.

The indictment is in one count and charged defendant under Title 18, U. S. C. A., Section 1621.

The charging portion of the indictment is summarized as follows:

That the grand jury was investigating the murder on February 28, 1950, of one Abram Davidian, who would have been the Government's witness at a trial and had been a witness before the grand jury in connection with indictment No. 21101. That the appellant was called as a witness in said investigation before the grand jury and asked to trace his whereabouts on February 28, 1950. Among other things, appellant stated he had a hair cut in a barber shop in Hollywood in the late afternoon of February 28, 1950, and that this was not true and that he was not in the barber shop on that day.

Questions in the Appeal.

Appellant's brief on appeal states three grounds of attack on the judgment.

(a) That the alleged perjury of appellant was not proved by the testimony of one witness and corroborating circumstances;

(b) That appellant was prejudiced by having the jury instructed that they could consider the indictment in case No. 21101 for the purpose of determining whether appellant's testimony before the grand jury was knowingly and wilfully perjurious.

(c) That the District Court erred in failing to grant a new trial on the ground that appellant was prejudiced by having the jury see a jury handbook in the jury room.

The Facts.

The Government's case rested on the testimony primarily of the three barbers who worked in the barber shop. Erwin Sharpe testified that the defendant had been in the barber shop on three occasions. The first occasion was a Thursday [Tr. p. 43]; he then became confused and said it was about the 28th of February. Upon being shown a calendar he resolved the confusion by stating that the first visit was Thursday, March 2, 1950 [Tr. p. 44]. Thereafter, in all his testimony, despite vigorous cross-examination, he maintained the first visit of defendant was March 2, 1950, and that defendant was not in the barber shop February 28, 1950.

Erwin Sharpe testified that the defendant was alone except for his small Schnauzer dog; that he was the barber who cut the defendant's hair; that it was approximately 5:30 to 6:00 o'clock in the evening and that all three barbers were present in the shop at the time of defendant's first visit.

George Sharpe stated that he was not in the barber shop on February 28th but that he was in the barber shop on March 2nd and on that day his brother Erwin Sharpe cut the defendant's hair [Tr. p. 118]; that all three barbers were there; that the defendant was accompanied by a small dog and that was the first time defendant had been in the shop.

Frank Riggi testified that he knew the defendant; that on the first occasion that the defendant visited the shop,

that all three barbers were present; that the defendant was accompanied by a small dog; that it was approximately 5:30 or 6:00 o'clock in the evening and that barber Erwin Sharpe had cut the defendant's hair.

The above facts have been stated in the light of the often enunciated rule which was summarized by the Supreme Court in *Glasser v. U. S.*, 62 Sup. Ct. 457, 315 U. S. 60, as follows:

“The Supreme Court may not weigh the evidence or determine the credibility of witnesses in a criminal case, but the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it.”

ARGUMENT.

There Was Sufficient Proof to Sustain the Jury's Verdict.

(a) The classic rule as to *quantum* of proof in perjury cases is that the oath of the defendant must be ranged against the oaths of two witnesses to the contrary in order to sustain a conviction. This rule has been gradually relaxed to the point that the law now is that one oath contrary to that of the defendant is sufficient if the one contrary witness is corroborated. The latest expression and discussion of the rule was in *United States v. Hiss*, 185 F. 2d 822, decided by the Second Circuit December 7, 1950, in which case certiorari has been denied. In that case, on page 829, in discussing the conviction on the first count, the Court points out that Whitaker Chambers's story, as contrasted to that of Alger Hiss, was sufficiently corroborated by the fact that the documents which Chambers said he had received from Hiss were typed on a typewriter belonging to Hiss.

Contrasting that corroboration with the instant case, we see how much more was introduced for corroboration in this case. Erwin Sharpe directly contradicts the defendant and places the defendant for the first time in the barber shop on March 2nd and states that defendant was not there on February 28th.

George Sharpe recalls all of the details of the first visit; including the date March 2, 1950, the fact that all three barbers were present; the time of day; the fact that his brother Erwin cut the defendant's hair; the fact that the defendant was accompanied by a dog, and positively states that it could not have been February 28th because he was not there that day.

Frank Riggi recalls the first time defendant was present. He recalls that Erwin Sharpe cut his hair; that all three barbers were present; that the defendant was accompanied by a dog; he recalls the time of day. He, however, does not recall the day. By putting the testimony of Riggi and George Sharpe together we find that we have more than another witness corroborating Erwin Sharpe. The testimony of the latter two might even have been enough for conviction.

Additional Cases on the Quantum of Corroboration Necessary.

U. S. v. Palese (3rd Cir.), 133 F. 2d 600;

U. S. v. Seavy (3rd Cir.), 180 F. 2d 837;

Boehm v. U. S., 123 F. 2d 791;

U. S. v. Margolis, 138 F. 2d 1002.

The District Court Did Not Err in Its Instructions.

(b) Appellant objects to the instruction by the Court that the jury could consider the existence of indictment No. 21101 in determining whether or not the defendant knowingly and wilfully intended to give false testimony on August 10, 1950. Attention is drawn to the carefulness with which the Court worded the two paragraphs of this instruction and the care with which the Court pointed out to the jury that they were not to consider or speculate concerning indictment No. 21101—the murder of Davidian—or the obstruction of justice investigation by the grand jury.

The Court's attention is also drawn to the fact that at the conclusion of the trial the Court refused to let the jurors see indictment No. 21101, for he felt prejudice

might arise in the jurors' minds from observing the nature of the charge, which was a narcotic violation, or the names of the other persons associated in the indictment of defendant, these being the names of notorious hoodlums in the Southern California area.

One of the necessary elements for the Government to establish was the materiality of the defendant's testimony before the grand jury. Murder, unless on a Government reservation, is not a Federal crime. The materiality of this investigation arose solely from the fact that the murdered man was to be a witness in the Federal District Court which would make his death, if done for the purpose of preventing his testimony, an obstruction of justice.

Defendant cites as his sole authority *Chipworthy v. U. S.*, 178 Fed. 442, and we point out the care which the Court and the Government exercised to keep out of the trial any speculation as to the defendant's connection with the murder of Abraham Davidian, any prejudice arising from the fact that the defendant was also charged in a narcotic case, and any speculation as to the defendant being connected with the obstruction of justice. In fact, in the very instruction which is complained of it is apparent the Court used great care in an endeavor to remove from the jurors' minds any speculation as to these matters. The Court endeavored by all means possible to confine the issues of the case strictly to that of perjury.

The Government contented itself solely with showing that an indictment existed, that defendant was also a defendant in that indictment, that Davidian had been a witness before the grand jury before the return of that indictment and was to be a witness for the Government at the trial, that Davidian had been killed and the date of his death. These matters were all necessary to show that

the whereabouts of the defendant on the day in question were material to the grand jury investigation.

On the question of materiality the Court's attention is drawn to

Carroll v. U. S., 16 F. 2d 651 (2d Cir.);

Luce v. U. S., 49 F. 2d 241.

On the question of motive or wilfullness, the statute under which the defendant was indicted contains the word "wilfully," the context being as follows:

"Whoever having taken an oath before a competent tribunal, etc., that he will testify, declare or certify truly, etc., *wilfully* and contrary to such oath states or subscribes any material matter which he does not believe to be true is guilty of perjury * * *."

The fact that Davidian would have been a witness against the defendant is definitely material to show what motive defendant had for perjury and why defendant's whereabouts on February 28, 1950, was material.

In *Brzezinski v. United States* (2d Cir.), evidence was allowed as against the defendant perjurer that he had indicated to another witness the possibility of securing money for absenting himself during the trial, the Court saying that such evidence went to show the motive for the perjurer's own false testimony.

In *Williamson v. U. S.*, 207 U. S. 425, at page 450, the Court discusses admissibility of evidence to show motive or intent in a conspiracy to commit perjury case. See also, *Ulmer v. U. S.*, 219 Fed. 641 (6th Cir.), at page 646

The District Court Did Not Err in Denying Defendant's Motion for a New Trial.

(c) Defendant's next citation is to the trial court's failure to grant a motion for new trial based on the affidavit of juror J. J. Leach.

It is settled law that a motion for a new trial is addressed to the sound discretion of the trial court. Defendant relies heavily on the case of *Mattox v. U. S.*, 146 U. S. 140. The reversal in that case was based on the fact that the trial court refused to accept an affidavit concerning the jury tampering. The Supreme Court stated that it is the general rule that a motion for a new trial is addressed to the sound discretion of the trial court. However, since the Judge did not accept the affidavit, he had, in effect, not exercised his discretion.

Of course there is a great deal of difference between the innocuous pamphlet which was considered by Judge Hall and the inflammatory newspaper account in the *Mattox* case.

Appellant's brief quotes certain short portions of the pamphlet entitled "A Handbook for Jurors," out of context in a strained effort to show something prejudicial to his client. However, when the Court reads the pamphlet it will be quite apparent that there was nothing in it which could prejudice the defendant Adams. A cursory reading of the pamphlet indicates that in a number of places it points out that the Judge is the sole source of the law to the jury [Tr. pp. 35, 46, 56].

Counsel makes much of the argument that the handbook gives sanctity to the fact that an indictment is by grand jury, yet in the handbook [Tr. pp. 47, 48], it is carefully pointed out that the indictment is merely a one-sided

presentation of the case and is not to be considered as evidence.

Judge Hall at the time of the *voir dire* examination pointed out to the jurors [Tr. p. 7] that an indictment was not evidence. At the same discussion he pointed out that he was the source of the law [Tr. p. 9]. He commenced his instructions with an admonition to the jury that they were to follow the law of the case as stated by him [Tr. p. 529].

In *Colt v. U. S.*, 190 Fed. 305, the Court considered the failure to grant a motion for a new trial where the bailiff had given a copy of the Federal Statutes to the Jury. The Court sustained the trial court, pointing out at page 310, that there was nothing in the Revised Statutes which had not been given to the jury in the Judge's instructions. The Court also pointed out that there was no showing that the prosecution had anything to do with the statutes being given to the jury.

In *Roberts v. U. S.*, 50 F. 2d 871, a group of jurors made an unauthorized visit to the scene of the crime. The Court, at page 872, points out that a motion for a new trial is addressed to the sound discretion of the trial court and, in the absence of a showing of abuse on his part, he will be sustained on review.

U. S. v. Compagna, 146 F. 2d 524.

In this case the trial Judge stopped and inquired of the jurors as to what testimony they had requested to be read and the Court had the following to say (p. 528) in dis-

cussing the rule that nothing should reach the jury except in the courtroom:

“But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity.”

This Court had a similar question before it recently in the case of *Orestus Cavness v. U. S.*, decided March 5, 1951. In this case a juror made two phone calls, one to his wife and the other to a garage, and the Court points out that there is a presumption of the juror faithfully performing his duties and makes the following remarks:

“* * * appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury’s conduct. [Fairmount Glass Works v. Coal Co., *supra*, 287 U. S. at 485.] And we adhere to the view that ‘When twelve jurors sit down to deliberate upon their solemn duty of pronouncing innocence or guilt upon a fellow human each exposes his own particular views of the evidence to the sound judgment of all with the result that tangential views have little chance of survival and practically none of getting eleven approving votes.’ ”

To summarize, there was nothing in the pamphlet which could have prejudiced the defendant, especially in view of the constant admonition in the pamphlet and in the Court’s instructions that the jury was to take the law of the case from the Judge.

Conclusion.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

ERNEST A. TOLIN,

United States Attorney,

WALTER S. BINNS,

Chief Asst. United States Attorney

Attorneys for Appellee.

No. 12765.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY WALTER ADAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

SAMUEL REISMAN and

BERTRAM H. ROSS,

453 South Spring Street,

Los Angeles 13, California,

Attorneys for Appellant.

TABLE OF AUTHORITIES CITED

CASES	PAGE
Cook v. United States, 26 App. D. C. 427.....	3
Fotie v. United States, 137 F. 2d 831.....	2
Hart v. United States, 131 F. 2d 59.....	2
People v. Woodcock, 52 Cal. App. 412.....	3
Phair v. United States, 60 F. 2d 953.....	2
Sullivan v. United States, 161 Fed. 253.....	3
United States v. Seavely, 180 F. 2d 837.....	2
Weiler v. United States, 323 U. S. 606.....	2

No. 12765.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY WALTER ADAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

To the Honorable Circuit Court of Appeals of the United States for the Ninth District:

The petition of appellant, Stanley Walter Adams, for a rehearing in the above entitled matter respectfully shows and represents:

That this Honorable Court did, on August 6, 1951, by its order duly entered and filed, affirm a judgment of conviction of your appellant for the crime of perjury. Appellant respectfully urges that the *Per Curiam* Opinion filed by this Court completely fails to dispose of important and substantial issues of law raised by appellant. Appellant seriously raised the question that the alleged perjury was not proved in the manner required by law; *i. e.*, by two direct witnesses, or by a direct witness and sufficient corroborating circumstances. The opinion of the Court, without any citation of authority and without any discussion of the factual basis upon which the

claimed errors are grounded, merely stated that the questions were solely for the jury.

We respectfully urge that if this Court holds, that as a matter of law that, irrespective of the testimony, that a jury can determine whether there has been corroboration or not it should so state. By its opinion this Court has in effect held that the matter of the insufficiency of the evidence is no longer a question of law, but that the jury can determine both where the truth lies and whether the evidence is sufficient or not and whether the evidence has been corroborated.

We sincerely believe that if this is the law the Court should so state based upon the factual situation before the Court and not merely gloss over the subject without referring to the facts. It is for the Court to determine the law, and we can have no complaint whichever way the Court determines the law, but we feel that we are entitled to know that there has been a change in judicial construction for future reference.

Apparently this Court does not question the requirement of corroboration in perjury cases:

Weiler v. U. S., 323 U. S. 606;

U. S. v. Seavely, 180 F. 2d 837;

Fotie v. U. S., 137 F. 2d 831.

There are many cases in the books holding that a judgment of conviction for perjury will be reversed in the absence of sufficient corroborating evidence:

Fotie v. U. S., 137 F. 2d 137;

Hart v. U. S., 131 F. 2d 59;

Phair v. U. S., 60 F. 2d 953;

Sullivan v. U. S., 161 Fed. 253;

People v. Woodcock, 52 Cal. App. 412;

Cook v. U. S., 26 App. D. C. 427.

Intellectual honesty requires a factual examination of this case. Appellant testified before the Grand Jury that he was in the barber shop in question on February 28, 1950, and he had been there on several other occasions. One witness and one witness alone, Erwin Sharpe, testified that it was not on February 28, 1950, that appellant was in the barber shop, but that it was on March 2, 1950 that appellant was in the barber shop. Erwin Sharpe also testified that appellant had been in the barber shop on a number of occasions. *No other witness testified that appellant was not in the barber shop on February 28, 1950.* George Sharpe testified that he himself was not in the barber shop on February 28, and he did not know who was in the shop on that date. He did, however, testify that he recalled that appellant was in the barber shop on Thursday or Friday of the week in question, which would place the date as March 2, or March 3. He did not and could not testify that appellant was not in the barber shop on February 28, for he himself was not there. He, too, admitted that appellant had been in the barber shop on a number of occasions.

The final futile effort to corroborate Erwin Sharpe came through the testimony of the third barber, Frank Riggi, who testified that appellant had been in the barber shop on several occasions, but on the first occasion that appellant was there, he recalled that both George and Erwin were there. He testified that he could not fix any day or dates and no attempt whatsoever was made to de-

termine whether Riggi was in the barber shop on either February 28 or March 2.

If this Court believes that there is sufficient corroboration in this record, it should state these facts in its opinion so that we may know that there has been a fundamental change in the necessary elements and ingredients of the doctrine of corroboration. What this Court has in effect held by affirming the judgment in this case is that Stanley Walter Adams' testimony that he was in the barber shop on February 28 was false because the government proved beyond any doubt that appellant was in the barber shop on March 2. If this is the law, and his presence on March 2 excludes the possibility of the truth of his testimony that he was there on February 28, this Court should so declare and state.

It is our reasoned opinion that there has been a serious miscarriage of justice in this case and that appellant was convicted as the result of confusion and of a failure to apply the recognized laws of perjury to his case.

Wherefore, appellant prays that the opinion filed on August 6, 1951 may be set aside and that a rehearing may be granted in this matter so that the Court may file its opinion passing upon the issues and errors relied upon

Dated: August 29, 1951.

Respectfully submitted,

SAMUEL REISMAN and
BERTRAM H. ROSS,

By BERTRAM H. ROSS,

Attorneys for Appellant.

Certificate of Counsel.

The undersigned, attorneys for appellant, do hereby certify that in their opinion the foregoing petition for rehearing is well taken in point of law and has not been interposed for purposes of delay.

SAMUEL REISMAN and

BERTRAM H. ROSS,

Attorneys for Appellant.

No. 12765.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY WALTER ADAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

SAMUEL REISMAN, and

BERTRAM H. ROSS,

712 Citizens National Bank Building,
Los Angeles 13, California,

Attorneys for Appellant.

FILED
MAY 28 1951
PAUL W. BARNER
CLERK

TOPICAL INDEX

	PAGE
Opening statement	1
Government's treatment of the facts.....	2
Summary of argument.....	4
Argument	5
A. That the alleged perjury of appellant was not proved by the testimony of two witnesses, or one witness and cor- roborating circumstances, as required by law.....	5
B. That appellant was prejudiced by having the jury in- structed that they could consider the indictment in case No. 21101 for the purpose of determining whether appel- lant's testimony before the grand jury was knowingly and wilfully perjurious	11
C. That appellant was prejudiced by having the jury re- ceive instructions from a jury handbook in the jury room outside of the presence of appellant.....	13
Conclusion	13

No. 12765.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY WALTER ADAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

Opening Statement.

We have read with interest the brief of appellee and earnestly feel that the government has failed to answer the points raised by appellant in his opening brief. In reply to the said brief, we will attempt to avoid repeating the points raised and statements made in our opening brief. However, because of the manner in which the appellee has treated the various points raised by us in our opening brief, we must in certain instances reconsider the evidence disclosed by the transcript and re-analyze the factual content of the record. We ask the court's indulgence in this respect, since we whole-heartedly feel that this type of presentation is required in order to properly show the fallacies of the government's arguments, as will be hereinafter demonstrated.

Government's Treatment of the Facts.

In connection with this portion of the government's brief appearing on pages 3 and 4, we specifically point out that in the following instances the facts have been incorrectly stated by the government.

On page 3 of the government's brief, it is stated that:

"Erwin Sharpe testified that the defendant had been in the barber shop on three occasions. The first occasion was a Thursday [Tr. p. 43]; he then became confused and said it was about the 28th of February. Upon being shown a calendar he resolved the confusion by stating that the first visit was Thursday, March 2, 1950 [Tr. p. 44]."

In connection with this quoted statement, we direct the court's attention to the fact that the witness Erwin Sharpe did not *first* testify as indicated by the government that the first occasion the defendant was in the barber shop was on a Thursday, and that he thereafter became confused and said it was about February 28th. The record reveals, however, that the witness Erwin Sharpe *first* testified as follows [Tr. p. 40, line 5]:

"Q. Now, then, when was the first occasion that you cut his hair? A. You mean what day?

Q. Yes. A. What day was it?

Q. Yes. A. Well, sometime in February, the end of February.

Q. And when was the date of the second occasion that you cut his hair? A. It was about a month or so after that."

Thus, it clearly appears from the foregoing portion of the record that the witness Erwin Sharpe *first* testified that the first occasion he cut the defendant's hair was some time in February. Obviously, the government's statement of the evidence on this point is incorrect.

We next pause to analyze the statement contained on page 3 of the government's brief:

"George Sharpe stated that he was not in the barber shop on February 28th but that he was in the barber shop on March 2nd and on that day his brother Erwin Sharpe cut the defendant's hair [Tr. p. 118 . . .]"

If by this statement the government means that George Sharpe himself was not in the barber shop on that date, such a statement is correct, but if the government means to imply from said statement of facts that George Sharpe testified that *appellant* was not in the barber shop on February 28th, the statement is inaccurate and contrary to the record, for on page 90, line 10, George Sharpe's testimony is as follows:

"Q. Were you in your shop on February 28, 1950? A. No, I was off that day."

* * * * *

Page 90, line 24, by Mr. Reisman:

"Q. Mr. Sharpe, you don't know of your own personal knowledge whether Mr. Adams was in your barber shop on February 28, 1950, or not, do you? A. Well, I wasn't there that day.

Q. That is exactly what I mean. So you don't know whether he was there or not, do you? A. No, I don't."

Summary of Argument.

A. THAT THE ALLEGED PERJURY OF APPELLANT WAS NOT PROVED BY THE TESTIMONY OF TWO WITNESSES, OR ONE WITNESS AND CORROBORATING CIRCUMSTANCES, AS REQUIRED BY LAW.

B. THAT APPELLANT WAS PREJUDICED BY HAVING THE JURY INSTRUCTED THAT THEY COULD CONSIDER THE INDICTMENT IN CASE NO. 21101 FOR THE PURPOSE OF DETERMINING WHETHER APPELLANT'S TESTIMONY BEFORE THE GRAND JURY WAS KNOWINGLY AND WILFULLY PERJURIOUS.

C. THAT APPELLANT WAS PREJUDICED BY HAVING THE JURY RECEIVE INSTRUCTIONS FROM A JURY HANDBOOK IN THE JURY ROOM OUTSIDE OF THE PRESENCE OF APPELLANT.

ARGUMENT.

A. That the Alleged Perjury of Appellant Was Not Proved by the Testimony of Two Witnesses, or One Witness and Corroborating Circumstances, as Required by Law.

Appellant does not want to be accused of indulging in specious argument. The government in its brief has by that type of argument attempted to corroborate the direct testimony of Erwin Sharpe to the effect that appellant was not in the barber shop on February 28, 1950. It reaches its illogical conclusion in the following manner: Erwin Sharpe testified that appellant was not in the barber shop on Tuesday; that he was there on Thursday, and that he had a little dog with him. George Sharpe then testified that although he wasn't in the barber shop on Tuesday and he, of course, didn't know who was in the barber shop on that day, he recalled appellant had his hair cut by his brother, Erwin, on Thursday; that appellant had a little dog with him and that all three barbers were present. Frank Riggi, the third barber, testified that although he couldn't fix dates, he recalled that the first time he knew of appellant's presence in the barber shop, appellant's hair was cut by Erwin Sharpe; that appellant had a little dog with him and that all three barbers were present.

Without attempting in any way to be facetious, we assert, that the government has properly established and corroborated the fact that appellant was in the barber shop on Thursday, March 2, 1950. BUT THE ISSUE IN THIS CASE IS WHETHER OR NOT APPELLANT TOLD THE TRUTH BEFORE THE GRAND JURY WHEN HE TESTIFIED BEFORE THAT BODY THAT HE WAS IN THE BARBER SHOP

ON TUESDAY, FEBRUARY 28, 1950. While a date is generally immaterial in a criminal matter so long as the offense was committed within the period of the statute of limitations, in this cause the date is not only material *but it is all important*. This for the reason that it appears from the record without contradiction that appellant was in the barber shop in question on at least three, if not more, occasions. Again, parsing the record, what corroboration is there to the testimony of Erwin Sharpe that appellant was not in the barber shop on February 28? The answer is obvious that there is none—George Sharpe can corroborate nothing as by his own testimony he wasn't there on February 28 and he didn't know who was in the barber shop on that date. Likewise, Riggi is of no help because he cannot fix dates.

We have carefully read and considered the cases cited by the government in its brief and those cases can give it little aid or comfort. It is true that corroboration may be circumstantial, but in this instance there is nothing in the record to support the judgment of conviction but the unsatisfactory confused testimony of Erwin Sharpe fixing the date as March 2. Had the testimony indicated that appellant was in the barber shop on only one occasion then we would say that there was sufficient corroboration by means of circumstantial evidence; however, the testimony of all three barbers indicates that appellant was there on at least three occasions and the testimony varies vastly as to the time elapsed between the various visits. We are not attempting to create confusion in this record—that was done without our help by the unsatisfactory testimony of the barbers. We will have no complain if this court desires to uphold the conviction on the un

corroborated testimony of one witness if it is the desire of this court to abrogate the rules of law that have existed from time immemorial requiring corroboration in perjury cases. But if this court is going to adhere to the long-established principles of law, we must insist that the court apply the recognized rules of logic in its examination of this record and we assert that the unsatisfactory testimony of Erwin Sharpe was not corroborated by proving that appellant was in the barber shop on March 2.

Applying the rules of logic in connection with the facts of this case, the government finds it is in this dilemma: Because Erwin Sharpe, after much hesitancy, fixed the date as March 2, everyone proceeds to forget the allegations of the indictment. The government then attempts to corroborate the date of March 2 by having George Sharpe fix the date as March 2 through a system of mental dead reckoning, *i.e.*, George wasn't there on Tuesday, February 28; Erwin had his day off on Wednesday, and the first day that all three barbers were present was on Thursday, and Thursday was March 2; hence it must have been March 2. George testified greatly about refreshing his recollection from the examination of his records, but when pressed as to what records he examined the best answer that we can find is that the FBI was most desirous of his fixing the date as of Thursday [Tr. p. 115, lines 8-14]. In fact, he testified the date could have been Thursday or Friday [Tr. p. 115, line 14]. To further add to the illogical processes applied, Riggi is brought in and Riggi testified that the first time he observed appellant in the barber shop was at a time when all three barbers were present and that appellant had a little dog with him. This definitely establishes, if the tes-

timony of the barbers is worthy of belief, that appellant was in the barber shop on March 2. But this appellant isn't accused of a crime because he was in the barber shop on March 2. There isn't an iota of evidence, nor is there a logical inference that can be drawn to corroborate Erwin Sharpe's testimony that appellant was not in the barber shop on Tuesday, February 28. George Sharpe's testimony in this regard has no qualitative or quantitative probative value. He just wasn't in the barber shop on Tuesday, February 28, and he doesn't know whether Adams, President Truman or a member of this Honorable Court was or was not in his barber shop on that date. Therefore, up to this point, there is no corroboration. The attempt to use Riggi as corroborative witness is even more futile. He can't fix any dates and the record is completely silent as to whether he was or was not working in the barber shop on the all-important date of February 28, 1950. Thus we can logically conclude that it wasn't established that Riggi was in the barber shop on the red letter day of February 28, 1950; his testimony to the effect that the first time he saw appellant in the barber shop was at a time when all three barbers were present and appellant had a little dog with him is of no probative value for purposes of corroboration, as we have previously shown.

In connection with our research on this phase of the case, we have attempted to find a case with a similar factual situation. That is, a case wherein the defendant was accused of perjury and there were three so-called witnesses to the facts. We feel that the case of *Phair v. U. S.*, 60 F 2d 953, which was cited in our opening brief on page 12 comes closest to the factual situation in the instant case

In the *Phair* case the defendant was accused of perjury in filing a false affidavit to the effect that he was not conducting a saloon business at a given premises, and that whereas at a later date before the United States Commissioner in the presence of three witnesses the defendant had made contrary statements to those contained in his affidavit. However, at the trial of the case, the three alleged witnesses to the defendant's statements made in the United States Commissioner's Office were confused as to the exact statements made by the defendant at said time, and disagreed among themselves as to what was actually said by the defendant. Only one of the witnesses actually testified that the defendant had categorically denied the statements contained in his written affidavit. In treating this problem, the court stated as follows, at page 954:

“To convict a person of perjury, probable or credible evidence is not enough. It must be strong and clear. In the case at bar there is a serious question as to whether or not the defendant said that he owned the ‘property’ in question or the saloon conducted on the premises. As above stated, the affidavit states that he did not own the saloon and was in no way connected with the business; but it contains no statement whatever as to the ownership of the real estate. To sum up the testimony on this point, one of the three witnesses, upon whom the government relies, did not remember the words that Phair used as to the ownership of the property or saloon; another testified that he admitted that he owned the ‘property’, the ‘premises’, while the third said that Phair stated that he owned the saloon. At most, there was an oath on one side and conflicting testimony as to what Phair later said contrary thereto, on the other, without sufficient attending circumstances. . . .”

We submit that the *Phair* case is conclusive upon the question of whether there exists sufficient corroborating evidence or attending circumstances in the instant case. As stated by the court in the *Phair* case, we have in the instant case only the unsatisfactory oath of Erwin Sharpe that the defendant was not in the barber shop on February 28th, as opposed to the defendant's positive statement that he was there on that day. The miscarriage of justice in this case stems from the confusion in the mind of the government that by establishing that appellant was in the barber shop on March 2, they completely and irrevocably foreclosed the possibility that he was there on February 28. So far as the alleged corroborating testimony is concerned in this case, appellant could well have been in the barber shop on both February 28 and March 2. It was the duty of the government to establish the guilt of appellant in accordance with the charge made against him in the indictment that his alleged perjury related to his whereabouts on February 28. Corroboration cannot be gleaned from this record unless appellant was presumed to have been guilty before he went to trial. While this court cannot reweigh the evidence, this court must be convinced that appellant was convicted by proper and legal evidence in the manner required by law in a perjury case in order for the judgment of conviction to be sustained. Accordingly, we submit that failure on the part of the government to prove the alleged perjury by the testimony of two witnesses or by one witness and corroborating circumstances requires and necessitates a reversal of the judgment of conviction below.

B. That Appellant Was Prejudiced by Having the Jury Instructed That They Could Consider the Indictment in Case No. 21101 for the Purpose of Determining Whether Appellant's Testimony Before the Grand Jury Was Knowingly and Wilfully Perjurious.

The government has attempted to bolster the challenged instruction by drawing certain unwarranted inferences from the record. (See Appellee's Br., last par., p. 7.) It is true that it was stipulated at the trial that indictment No. 21101 existed; that defendant was also a defendant in that indictment; that Davidian had been a witness before the Grand Jury before the return of that indictment and was to be a witness for the government at the trial; that Davidian had been killed and the date of his death. The stipulations upon which these statements were based appear mainly at pages 146 to 149 of the record. If this court will examine indictment No. 21101, which it has a right to do, it will ascertain that it is a multiple count indictment involving numerous defendants and that appellant in this case was only involved in one count of the indictment. There is nothing in the stipulations above referred to to indicate that Davidian was to be a witness for the government against *this* defendant as opposed to the other named defendants in said matter. We are not permitted to speculate as to which defendants Davidian would have testified against. If the government sought to avail itself of this type of evidence, it was incumbent upon the government to go forward and prove the fact that Davidian was to have been a witness in case No. 21101 against ap-

pellant, and what is more important, that appellant had knowledge of this fact. These things the government completely failed to prove. Therefore, any speculation or consideration by the jury of indictment No. 21101 as a means of ascertaining the appellant's state of mind at the time of his testimony before the Grand Jury was wholly inconsequential and permitted the jury to engage in the wildest type of speculation and surmise, all to the prejudice of the appellant. In view of the foregoing discussion we submit that the statement contained on page 8 of the defendant's brief to the effect that Davidian would have been a witness against the defendant is entirely without foundation in fact and was not proved at the trial. Perhaps the government intended to use the murdered witness Davidian as a witness against appellant, but this fact was never proved at the trial below. In its treatment of this point the government has confused the rules of relevancy, materiality and motive. This is patent from an examination of the cases cited in its brief.

We still believe that the points contained in our opening brief beginning at page 15 remain unanswered by the government and that it would be a useless repetition to again set forth the argument presented in that portion of our opening brief.

In concluding, it is our reasoned view that the challenged instruction relating to indictment No. 21101 was prejudicial to the rights of appellant and is an additional ground entitling him to a reversal of the judgment of conviction.

C. That Appellant Was Prejudiced by Having the Jury Receive Instructions From a Jury Handbook in the Jury Room Outside of the Presence of Appellant.

There is no question from the record or the government's brief that the matters referred to under this heading in relation to the use of the jury handbook actually occurred. We are mindful that this is a point that has not heretofore been passed upon by this court. We believe that both sides have adequately presented the question and that it should be determined by this court so that there will be some standard in the future to govern the conduct of documents that may be received by a jury in the jury room during its deliberations and outside of the presence of the defendants.

Despite the fact that the government attempts to charge us with misinterpreting certain language contained in the handbook for jurors, we submit that said document is before this court in its entirety. We don't know, any more than the government knows, what paragraphs, portions or sentences of the handbook were considered by the jury during its deliberations—but this we know—it was read aloud and considered by the jury.

Conclusion.

It is respectfully submitted that for the reasons hereinbefore set forth in our opening brief as well as in this brief, the judgment of conviction rendered herein should be reversed.

Respectfully submitted,

SAMUEL REISMAN and
BERTRAM H. ROSS,

Attorneys for Appellant.

No. 12766

United States
Court of Appeals
for the Ninth Circuit.

JOHN URQUHART BIRNIE, an Individual Doing Business as Birnie Electric Company, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corporation,

Appellants,

vs.

THE PERMANENTE METALS CORPORATION, a Corporation, and UNITED STATES MARITIME COMMISSION,

Appellees.

Transcript of Record
In Three Volumes
Volume I
(Pages 1 to 288)

Appeal from the United States District Court,
Northern District of California,
Southern Division.

No. 12766

United States
Court of Appeals
for the Ninth Circuit.

JOHN URQUHART BIRNIE, an Individual Doing Business as Birnie Electric Company, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corporation,

Appellants,

vs.

THE PERMANENTE METALS CORPORATION, a Corporation, and UNITED STATES MARITIME COMMISSION,

Appellees.

Transcript of Record
In Three Volumes
Volume I
(Pages 1 to 288)

Appeal from the United States District Court,
Northern District of California,
Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer of Cross-Defendant United States Maritime Commission to Counter-Claim and Cross-Complaint of John Urquhart Birnie..	141
Answer to First Amended Complaint, Cross- Complaint and Counter-Claim of John Urqu- hart Birnie and Massachusetts Bonding and Insurance Co.....	101
Ex. A Subcontract	129
Answer of John Urquhart Birnie and Massa- chusetts Bonding and Insurance Co.....	59
Ex. A Subcontract	79
Answer of the Permanente Metals Corp., to Counterclaim and Cross-Complaint of John Urquhart Birnie, an Individual Doing Busi- ness as Birnie Electric Co., and Massachu- setts Bonding and Insurance Co.....	129
Appeal:	
Appellee's Designation of Contents of Rec- ord on	185
Certificate of Clerk to Record on.....	578
Certificate of Clerk to Supplement to Rec- ord on	581

INDEX

PAGE

Appeal—(Continued)

Concise Statement of Points on Which Defendant, Cross-Complainant and Appellant, John Urquhart Birnie, an Individual Doing Business as Birnie Electric Co., Intends to Rely on.....	174
Concise Statement of Points on Which Defendant, Cross-Complainant and Appellant, Massachusetts Bonding and Insurance Co., Intends to Rely on.....	178
Cost Bond on.....	171
Designation on	585
Designation of Contents of Record on.....	185
Notice of	170
Appellee's Designation of Contents of Record on Appeal	183
Certificate of Clerk to Record on Appeal.....	578
Certificate of Clerk to Supplement to Record on Appeal	585
Complaint	1
Ex. A—Contract	1
B—Addendum No. 1.....	3
C—Addendum No. 2.....	4
D—Addendum No. 3.....	4
E—Performance Bond	5
F—Performance Bond	5
G—Endorsement	5
H—Performance Bond	5

INDEX	PAGE
Concise Statement of Points on Which Appellant Intends to Rely.....	586
Concise Statement of Points on Which Defendant, Cross-Complainant and Appellant, John Urquhart Birnie, an Individual Doing Business as Birnie Electric Co., Intends to Rely on Appeal	174
Concise Statement of Points on Which Defendant, Cross-Complainant and Appellant, Massachusetts Bonding and Insurance Co., Intends to Rely on Appeal.....	178
Cost Bond on Appeal.....	171
Designation on Appeal	585
Designation of Contents of Record on Appeal.	183
Exhibits, Defendant's:	
No. 1—Letter Dated November 9, 1943..	724
2—Letter Dated December 6, 1943..	726
3—Letter Dated December 10, 1943..	730
4—Letter Dated December 11, 1943..	733
5—Agreement	735
6—Letter Dated June 3, 1944.....	742
7—Letter Dated July 3, 1944.....	744
8—Letter Dated December 27, 1945..	746
9—Letter Dated January 14, 1946...	749
10—Transfer of Title to Navy of 202 Maritime Commission Owned Vessels	750

INDEX

PAGE

Exhibits, Defendant's—(Continued):

No. 11—Naval Vessels Register, NAV-SHIPS 18-1-8 Dated 1 July, 1947.	753
12—Excerpts From Quarterly Combined Authorization Report—NAVSHIPS (1851), Report No. 40, 1 January, 1947.....	754
13—Ship Construction Progress.....	755
14—Letter Dated April 4, 1947.....	757
15—Letter Dated March 20, 1947.....	759

Exhibits, Plaintiff's:

B—Contract No. MCo-15762	595
C—Contract No. MCo-15762 Addendum No. 2	626
M—Regulations Prescribing Method of Determining Profit	635
T—Design Filing System October 1, 1947	675
DD—Permanent Report of Completed Ship Construction Contracts.....	68
EE—Report No. 72	68
FF—Certificate of Delivery of Vessel Hull #527	68
GG—Letter Dated April 14, 1944.....	68
II—Letter Dated May 25, 1944.....	69
KK—Memorandum Dated November 13, 1945	69

INDEX

PAGE

Exhibits, Plaintiff's—(Continued) :

LL—Letter Dated November 14, 1945...	705
MM—Memorandum Dated January 7, 1946	709
NN—Memorandum Dated March 9, 1944.	714
OO—Memorandum Dated May 22, 1944..	720
Findings of Fact and Conclusions of Law....	147
First Amended Complaint for Payment of Money Due and Against Principal and Surety Upon Contract Performance Bond.....	89
Judgment	168
Names and Addresses of Attorneys.....	1
Notice of Appeal	170
Order	146
Reporter's Transcript	209
Reporter's Transcript of Pre-Trial Conference	188
Stipulation Changing Time and Place for Tak- ing Deposition	360
Stipulation Shortening Contents of Printed Book of Exhibits	587
Stipulation and Order Re Printing of Docu- mentary Exhibits	583
Supplement to Stipulation Shortening Contents of Printed Book of Exhibits.....	592

INDEX

PAGE

Witnesses, Defendants':

Barter, Herman

—direct 259

—cross 271, 280, 287

McShane, Captain

—direct 303

Witnesses, Plaintiff's:

Maher, John Bassette (Deposition)

—direct 414, 452

—cross 481

—redirect 496

—recross 500

McDonald, R. L. (Deposition)

—direct 364

—cross 391, 399

—redirect 405

Walkup, Bruce

—direct 225

—cross 235

Wanless, Ivan Joyce

—direct 50

—cross 53

—redirect 55

NAMES AND ADDRESSES OF ATTORNEYS

HILL, FARRER and BURRILL,

411 West Fifth Street,
Los Angeles, California.

MELLIN, HANSCOM and HURSH,

391 Sutter Street,
San Francisco, California,

Attorneys for Defendant and Cross-Complainant and Appellant, John Urquhart Birnie, doing business as Birnie Electric Company.

CRIDER, RUNKLE and TILSON,

1219 Bank of America Building,
Los Angeles, California,

Attorneys for Defendant and Cross-Complainant and Appellant, Massachusetts Bonding and Insurance Company.

BRUCE WALKUP,
WILLIS S. SLUSSER,
THELEN, MARRIN, JOHNSON and BRIDGES,
111 Sutter Street,
San Francisco, California,

Attorneys for Plaintiff and Cross-Defendant and Appellee, The Permanente Metals Corporation, a Corporation.

FRANK J. HENNESSY,
United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California,

Attorney for Cross-Defendant and Appellee United States Maritime Commission, etc.

In the United States District Court, for the Northern District of California, Southern Division

No. 26215S:

THE PERMANENTE METALS CORPORATION, a Corporation,

Plaintiff,

vs.

JOHN URQUHART BIRNIE, an Individual Doing Business as BIRNIE ELECTRIC COMPANY, MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corporation, FIRST DOE, SECOND DOE, THIRD DOE, FIRST DOE COMPANY, SECOND DOE COMPANY, THIRD DOE COMPANY, Defendants.

COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT, FOR GOODS AND SERVICES, AND AGAINST PRINCIPAL AND SURETY UPON CONTRACT PERFORMANCE BOND

Plaintiff complains of defendants above named, and for a First Cause of Action alleges that:

I.

At all times herein mentioned, plaintiff was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and duly qualified and doing business in the State of California, with its principal place of business in the Northern District of California.

II.

At all times herein mentioned, defendant, John Urquhart Birnie, also sometimes known and referred to as John U. Birnie, was, and now is, a resident of the State of California, and was, and is, doing business in the Northern District of California and elsewhere as Birnie Electric Company.

III.

At all times herein mentioned, Massachusetts Bonding and Insurance Company, a corporation, was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, and duly qualified and doing business in the State of California, and particularly in the Northern District of California.

IV.

First Doe, Second Doe, Third Doe, First Doe Company, Second Doe Company and Third Doe Company are the fictitious names of defendants whose true names are unknown to plaintiff, and plaintiff asks that when such true names are discovered, that this Complaint may be amended by inserting such true names in the place and stead of such fictitious names, together with appropriate charging allegations.

V.

The amount involved in this litigation exceeds, exclusive of interest and costs, the sum of \$3,000.00

VI.

On or about May 29, 1944, in Contra Costa County, California, in the Northern District of California, plaintiff and defendant, John Urquhart Birnie, doing business as Birnie Electric Company, made and entered into a certain contract in writing, bearing date of May 29, 1944, designated Vessels Subcontract No. VS-14, under United States Maritime Commission Contract No. MCo-15762. Said contract was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about August 3, 1944, in Contra Costa County, California, in said Northern District of California. A true copy of said contract is attached hereto, marked "Exhibit A," and by reference made a part hereof as though fully set forth herein.

VII.

On or about August 10, 1944, plaintiff and said defendant duly executed an Addendum to said contract designated as Addendum No. 1 to Subcontract No. VS-14. Said Addendum No. 1 was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about September 19, 1944. A true copy of said Addendum No. 1 is attached hereto, marked "Exhibit B," and by reference made a part hereof as though fully set forth herein.

VIII.

On or about October 19, 1944, plaintiff and said defendant duly executed an Addendum to said contract designated as Addendum No. 2 to Subcontract No. VS-14. Said Addendum No. 2 was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about October 28, 1944. A true copy of said Addendum No. 2 is attached hereto, marked "Exhibit C," and by reference made a part hereof as though fully set forth herein.

IX.

On or about November 20, 1944, plaintiff and said defendant duly executed an Addendum to said contract, designated as Addendum No. 3 to Subcontract No. VS-14. Said Addendum No. 3 was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about February 27, 1945. A true copy of said Addendum No. 3 is attached hereto, marked "Exhibit D," and by reference made a part hereof as though fully set forth herein.

X.

Plaintiff has fully and faithfully done and performed all acts and things on its part to be done or performed under said contract and the said Addenda thereto.

XI.

Said contract contained a Special Provision No. 4, to which reference is hereby made, whereby said defendant agreed to account for and pay to plaintiff profits realized by said defendant in the performance of the contract as determined by the United States Maritime Commission to be in excess of 10% of the total contract price, such amount so paid to become the sole property of the United States Maritime Commission.

XII.

The work to be performed by said defendant under said contract and the Addenda thereto was completed on or before March 26, 1946. After the completion of such work, and on or about March 26, 1946, the United States Maritime Commission determined the amount of such excess profits under Special Provision No. 4, which said defendant agreed to pay to plaintiff for the benefit of the United States Maritime Commission, to be the sum of \$190,490.96, as follows:

Stated Contract Price	\$430,963.95
Less, Final Contract Price, including Profit	240,472.99
<hr/>	
Profits in Excess of 10% of Stated Contract Price	\$190,490.96

XIII.

Plaintiff paid to said defendant prior to such determination by the United States Maritime Commis-

sion of the amount of excess profits, as aforesaid, the total sum of \$389,419.56, which total sum was \$148,946.57 in excess of said final contract price of \$240,472.99 as determined by the United States Maritime Commission, as aforesaid.

XIV.

On or about June 19, 1946, plaintiff made a written demand upon said defendant for the payment to plaintiff of the said sum of \$148,946.57, but said defendant has failed and refused, and still fails and refuses, to pay said sum, or any part thereof, to plaintiff, and there is now due, owing and unpaid from said defendant to plaintiff, pursuant to said Contract No. VS-14 and the Addenda thereto, the sum of \$148,946.57.

Wherefore, plaintiff prays judgment against said defendant as hereinafter requested.

For a Second and Separate Cause of Action, plaintiff alleges that:

I.

Plaintiff repleads all of the allegations contained in Paragraphs I to XIV, inclusive, of plaintiff's First Cause of Action, to which reference is hereby made, and the same are hereby incorporated and referred to in this Second Cause of Action and made a part hereof as though the same were fully set forth herein.

II.

On or about July 31, 1944, defendant, John Urqu-

hart Birnie, doing business as Birnie Electric Company, as principal, and defendant, Massachusetts Bonding and Insurance Company, as surety, for a valuable consideration, made, executed and delivered to plaintiff a certain Performance Bond No. C-28504, in favor of "The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear," in the sum of \$44,048.45 to secure the faithful performance by defendant John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract No. VS-14, and all modifications and extensions thereof. Said Performance Bond was, and is, by its terms binding upon said principal and surety, jointly and severally, and has been at all times since said date, and now is, in full force and effect. A true copy of said Performance Bond is attached hereto, marked "Exhibit E," and by reference made a part hereof as though fully set forth herein.

III.

On or about August 28, 1944, defendant, John Urquhart Birnie, doing business as Birnie Electric Company, as principal, and defendant, Massachusetts Bonding and Insurance Company, as surety, for a valuable consideration, made, executed and delivered to plaintiff a certain Performance Bond, No. C-28589, in favor of "The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear," in the sum of \$150,754.22, to

further secure the faithful performance by defendant, John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract No. VS-14 and Addendum No. 1 thereto, and all modifications and extensions thereof. Said Performance Bond was and is, by its terms binding upon said principal and surety, jointly and severally, and has been at all times since said date, and now is, in full force and effect. A true copy of said Performance Bond is attached hereto, marked "Exhibit F," and by reference made a part hereof as though fully set forth herein.

IV.

On or about October 31, 1944, defendant, Massachusetts Bonding and Insurance Company, for valuable consideration, made, executed and delivered to plaintiff an Endorsement to be attached to and form a part of said Performance Bond No. C-28504 and said Performance Bond No. C-2858, whereby the coverage of each of said Performance Bonds was, and is, increased by \$25,000.00 to further secure the faithful performance by defendant, John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract VS-14 and the Addendum thereto. Said Endorsement has been at all times since said date, and now is, in full force and effect. A true copy of said Endorsement is attached hereto, marked "Exhibit G," and by reference made a part hereof as though fully set forth herein.

V.

On or about November 9, 1944, defendant, John Urquhart Birnie, doing business as Birnie Electric

Company, as principal, and defendant, Massachusetts Bonding and Insurance Company, as surety, for a valuable consideration, made, executed and delivered to plaintiff a certain unnumbered Performance Bond in favor of "The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear," in the sum of \$87,566.38, to secure the faithful performance by defendant, John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract No. VS-14, and all modifications and extensions thereof. Said Performance Bond was, and is, by its terms binding upon said principal and said surety, jointly and severally, and has been at all times since said date, and now is, in full force and effect. A true copy of said Performance Bond is attached hereto, marked "Exhibit H," and by reference made a part hereof as though fully set forth herein.

Wherefore, plaintiff prays judgment against said defendants as hereinafter requested.

For a Third and Separate Cause of Action, Plaintiff alleges that:

I.

Plaintiff repleads all of the allegations contained in Paragraphs I, II and IV of plaintiff's First Cause of Action, to which reference is hereby made, and the same are hereby incorporated and referred to in this Third Cause of Action and made a part hereof as though the same were fully set forth herein.

II.

Within two years last past, defendant, John Urquhart Birnie, doing business as Birnie Electric Company, became indebted to plaintiff in the sum of \$1,545.66 for the agreed and reasonable value of goods furnished and services rendered by plaintiff to said defendant at said defendant's special instance and request in the County of Contra Costa, in the Northern District of California.

III.

Plaintiff has made demands upon said defendant for the payment of said sum of \$1,545.66, but said defendant has failed and refused to pay the same to plaintiff, and the said sum is now due, owing and unpaid.

Wherefore, plaintiff prays judgment against said defendants as hereinafter requested.

1. Against defendant, John Urquhart Birnie, doing business as Birnie Electric Company, for the sum of \$148,946.57, mentioned in the First Cause of Action, together with interest upon said sum until paid, as allowed by law.

2. Against defendant, John Urquhart Birnie, doing business as Birnie Electric Company, and defendant, Massachusetts Bonding and Insurance Company, jointly and severally, for the sum of \$148,946.57, mentioned in the said Second Cause of Action, together with interest upon said sum until paid, as allowed by law.

3. Against defendant, John Urquhart Birnie, doing business as Birnie Electric Company, for the sum of \$1,545.66, mentioned in said Third Cause of Action, together with interest upon said sum until paid, as allowed by law.

4. For costs of suit, and for such other and further relief as may be proper.

/s/ BRUCE WALKUP,
/s/ WILLIS S. SLUSSER,

THELEN, MARRIN,
JOHNSON & BRIDGES,
Attorneys for Plaintiff.

EXHIBIT A

The Permanente Metals Corporation

(Shipyard Number Two)

Post Office Box 1072

Richmond, California

United States Maritime Commission

Contract No. MCc-15762

Vessels Subcontract No. VS-14

Date: May 29, 1944

The Permanente Metals Corporation, hereinafter referred to as Contractor, and Birnie Electric Company, with offices located at 816 West 5th Street, Los Angeles, California, hereinafter referred to as Subcontractor, hereby agree that the following work shall be performed for the compensation and upon the terms and conditions hereinafter set forth on the

face of this Subcontract, and including Articles 1 through 44 of the Terms and Conditions attached to and made a part of this Subcontract;

Work to Be Performed:

Article 1. Degaussing—Subcontractor shall furnish all supervision, labor, equipment and materials, except such as may be furnished by the United States Navy necessary completely to fabricate and install the Degaussing System, including the degaussing troughs, covers, straps, cables, kick pipes bulkhead penetrations, junction boxes, control panels and wiring.

Article 2. Radar—Subcontractor shall furnish all supervision, labor, equipment and materials not furnished by Contractor or the United States Navy, completely to install the Radar System as outlined by the United States Navy, except the pulling and strapping of cables that may run in the main cable ways.

Article 3. Voice Tube—Subcontractor shall furnish all supervision, labor, equipment and material not furnished by Contractor or the United States Navy, necessary completely to make and install all straps and hangers required throughout the Voice Tube System and shall mount all equipment furnished with the Voice Tube.

Article 4. Mechanical Telegraph—Subcontractor shall furnish all supervision, labor, equipment and materials not furnished by Contractor or the United States Navy necessary completely to make and i-

stall all straps and hangers required throughout the Mechanical Telegraph System, and mount all equipment furnished for the Mechanical Telegraph System.

Article 5. Mechanical Wireways—Subcontractor shall furnish all supervision, labor, equipment, machinery, tools of every description, and materials, not furnished by Contractor or the United States Navy, necessary completely to fabricate the wireways and install same on the vessel; said fabricating to be done at Subcontractor's plant.

Plans, Drawings and/or Specifications:

Subcontractor shall perform said work in accordance with drawings and/or specifications herein mentioned under the numbers corresponding to the foregoing articles under "Work to Be Performed."

Article 1. S81-1, S81-2 and S81-3

Article 2. S67-0-6 and S67-0-7

Article 3. S65-4-3, S65-4-3-3 and S65-4-3-4

Article 4. S65-4-8-1, S65-4-8-2,
S65-4-8-3 and S-65-4-8

Article 5. S62-2-9, S62-2-9-1,
S62-2-9-2 and S62-2-9-3

The Degaussing System shall be for the Single Screw Cargo Vessel—U.S.M.C. Design VC2-S-AP5, and Certificate of Acceptance by the United States Navy shall be required prior to delivery of each vessel. Detailed plans and working drawings shall be prepared by Subcontractor and must have ap-

proval of Contractor, United States Maritime Commission and the United States Navy prior to fabrication and installation.

All installations of equipment shall be installed in accordance with the methods outlined by G.G.S. Plan No. V. 1665—S1-7-1, latest alterations. Minor changes shall be made by Subcontractor at no expense to Contractor.

Location of Work:

All installation work shall be performed at the Contractor's Shipyard No. 2, Richmond, California. However, Subcontractor may do certain fabricating at its own plant.

Items to Be Furnished by Contractor:

Contractor shall install the cable from the De gaussing Control Panel to the Wheelhouse and provide the penetration at the Binnacle at the required locations and support said cable.

All raw materials required for the installation of the Radar, Voice Tube and Mechanical Telegraph shall be furnished by Contractor.

Contractor shall provide space for the storage of materials required for the work aforesaid together with electric power, light, water and air service, also crane service and such transportation as may be necessary to haul wire reels and heavy parts of equipment within the aforesaid shipyard.

Work to Commence:

Subcontractor shall commence the aforesaid work as directed by Contractor.

Work to Be Completed:

Subcontractor shall perform said work in such manner as to keep abreast of Contractor's construction program.

The schedule of estimated deliveries of the five vessels upon which Subcontractor is to perform said work is as follows: July 29, 1944; August 26, 1944; September 2, 1944; September 9, 1944; and September 16, 1944.

Compensation:

Compensation for the performance of said work shall be paid to Subcontractor as follows, subject to the Terms and Conditions herein covering payments:

	Per Vessel
Article 1. For completion of Degaussing System.....	\$ 7,725.00
Article 2. For completion of Radar System	2,983.00
Article 3. For completion of Voice Tube System.....	666.00
Article 4. For completion of Mechanical Telegraph....	2,796.00
Article 5. For completion of Mechanical Wireways	3,333.00
	<hr/>
Sub total	\$17,503.00
Cost of bond at the rate of \$6.65 per Thousand Dollars	116.38
	<hr/>
Grand total	\$17,619.38

It is understood by the Contractor that the Subcontractor has previously submitted bids on certain items of work in connection with the wiring of the Guns and Gun Control System, Gyros and Radios and that the Subcontractor has performed certain of this work on hull No. 552. It is hereby agreed that the Subcontractor shall be paid the following percentages of his bid price for such work:

Item	Per Cent of Work Completed	Subcontractor's Bid Price	Amount Payable
Guns	2%	\$2,129.00	\$ 42.58
Gun Control	2%	4,259.00	85.18
Gyro	4%	2,818.00	112.72
Radio	3%	4,541.00	136.23

Bonds: Required (See Article 23).

Liquidated Damages: None specified.

Special Provisions:

1. Subcontractor shall perform the aforesaid work on Hulls Nos. 552 to 556, inclusive, a total of five (5) vessels under Prime Contract No. MCc-15762.

2. Contractor shall pay Subcontractor by monthly payments; said payments shall be based upon 90% of the sum due on progress estimates made by the Subcontractor and approved by the Contractor. Contractor shall withhold ten per cent (10%) of such sums pending final determination of profits under this subcontract, as hereinafter provided.

3. Outstanding amounts, if any, due at the completion of this subcontract are payable fifteen (15) days after final determination of such amounts as provided in this subcontract.

4. Report of Cost—Excess Profits: The Subcontractor agrees to account for and pay to the Contractor certain profits derived under this contract and for such purposes agrees:

(a) To make a report under oath to the Com

mission care of the Contractor upon completion of this contract, setting forth in the form prescribed by the Commission the total contract price, the total cost of performing the contract, the amount of Subcontractor's overhead charged to such cost, the net profits and the percentage such net profit bears to the contract price, and such other information as the Commission shall prescribe;

(b) To pay to the Contractor profit as shall be determined by the Commission in excess of ten (10) per cent of the total contract price which amount shall become the sole property of the commission;

(c) To make no subdivisions of any contract or subcontract for the same article or articles for the purpose of evading the provisions of this Article; and any subdivision of any contract or subcontract involving an amount in excess of \$10,000 shall be subject to the conditions prescribed in this article; provided that agreements for the purchase of material and/or for the rental of equipment shall not be considered as subdivisions of any contract or subcontract within the meaning of this section;

(d) That the books, files and all other records of the Subcontractor or any holding, subsidiary, affiliated, or associated company, shall at all times be subject to inspection and audit by any person designated by the Contractor or the Commission, and the premises shall at all times be subject to inspection by the agents of the Commission and Contractor.

It is further understood and agreed that the Commission shall prescribe the method of determining the Subcontractor's profits: Provided, that, in com-

puting such profits no salary of more than \$25,000 per year to any individual shall be considered as a part of the cost and no cost will be allowed which, in the judgment of the Commission, is not fair and just or is in excess of a reasonable market price for commodities or goods or services purchased or charged.

Although the accounting for profits and payments to be made under the provisions of this Article shall be in accordance with the provisions of Section 505 (b) of the Merchant Marine Act, 1936, as amended and the regulations of the Commission issued pursuant thereto, the losses incurred in connection with the performance of this contract shall not be used in connection with computing profits derived under any other contracts that the Subcontractor may have with the Contractor or Commission and losses incurred in connection with such other contracts shall not be used in connection with computing profits derived under this contract, it being understood and agreed that the obligation of the Subcontractor to make payments under this Article is contractual and that such payments shall in effect constitute a reduction of the amount of the contract price which the Contractor is entitled to retain.

5. The following changes shall be made in the following articles of the general Terms and Conditions:

(a) The last sentence of Article A, commencing "If partial termination of this order . . ." shall be deleted from said Terms and Conditions.

(b) In the last sentence of Article 17 B (2), the following language shall be added after the words "shall exclude" to wit: "Any cost for interest on borrowings, and shall exclude . . ."

(c) The last sentence of Paragraph 17 C shall be deleted and the following sentences substituted in lieu thereof: "As directed by the Contractor, the Subcontractor will transfer and make delivery of such articles, materials, work in progress or other things not so retained or sold. Appropriate adjustment will be made for delivery costs or savings therein."

This Subcontract is subject to the approval of the United States Maritime Commission.

THE PERMANENTE METALS
CORPORATION,
Contractor.

By /s/ T. A. BEDFORD,
Assistant General Manager.

BIRNIE ELECTRIC
COMPANY,
Subcontractor.

By /s/ JOHN URQUHART BIRNIE,
Sole Proprietor.

Approved 8/3/45:

THE UNITED STATES
MARITIME COMMISSION,

By /s/ C. V. FISHER,
Material Controller.

Approved as to Form:

THE PERMANENTE METALS
CORPORATION,

By /s/ LUCAS A. POWER,
Legal Department.

Revision No. 2 5-43

Terms and Conditions

Article 1. Items to Be Supplied by Contractor: Contractor agrees to supply, without charge to Subcontractor, at the site of work for use by Subcontractor in connection with the performance of the work under this Subcontract, the items specified on the face of this subcontract.

Article 2. Items to Be Supplied by Subcontractor: Subcontractor agrees to supply at the location where the work is to be performed at no charge other than the compensation provided on the face of this Subcontract, everything necessary for the complete performance of this Subcontract, including all labor, tools implements, equipment, machinery and materials, except such as is to be supplied by Contractor as described on the face of this Subcontract.

Should the Subcontractor at any time during the performance of this Subcontract be delayed in the performance of the work hereunder by reason of lack of materials or equipment to be furnished by Subcontractor, the Contractor reserves the right upon written notice to Subcontractor to supply such materials or equipment to the Subcontractor, and the cost of such materials and reasonable rental for the equipment shall be deducted from the amounts becoming due to Subcontractor hereunder.

Article 3. No Representations to Subcontractor: It is distinctly understood and declared by the Subcontractor that this Subcontract is made for the consideration set forth on the face of this Subcontract and that the Subcontractor has by careful examination satisfied himself as to the nature and location of the

work to be performed, the conformation of the ground, the character, quality and quantity of the materials to be encountered, the character of equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and as to any and all other matters and conditions which can in any way affect the work under this Subcontract. No verbal agreement or conversation with any officer, agent or employee of the Contractor either before or after the execution of this Subcontract, shall affect or modify any of the terms or obligations herein contained.

Article 4. Municipal Fees and Deposits: Subcontractor agrees to secure all necessary permits in connection with the performance of the work under this Subcontract and to pay all municipal and other fees in connection therewith, and agrees to furnish at its expense any and all bonds and cash or other deposits required by law or required by any lawful body having the right to make demand therefor.

Article 5. Compliance With Applicable Governmental Statutes and Regulations: Subcontractor, its employees and all others acting under its direction or control, shall at all times observe and comply with, in so far as they may be applicable, any and all laws, ordinances, statutes, rules and regulations of the United States and of the State of California and of their executive and administrative agencies and of any and all other governmental agencies having any jurisdiction over the work to be done hereunder, and shall also observe and comply with any and all rules and regulations of the Contractor pertaining to the conduct of work at the shipyard site.

Article 6. Plans, Drawings and/or Specifications: Subcontractor agrees fully to perform this Subcontract to the entire satisfaction of Contractor and in strict conformance with any plans, drawings and/or specifications referred to or incorporated in this Subcontract, or in any amendments or additions made to this Subcontract, and also in conformance with any plans, drawings and/or specifications in effect at the date of this Subcontract, required by any lawful body having the right to demand that said work should be performed in the manner specified by such body.

Article 7. Additional Drawings: Contractor, in its discretion, may supply Subcontractor with such additional plans, drawings, specifications and/or explanations as may be necessary to further detail and illustrate the work to be done, and Subcontractor agrees to conform thereto. Subcontractor, where Contractor deems necessary, will furnish Contractor with shop and/or work drawings showing details of work to be performed.

Article 8. Deviation From Plans, Drawings, and/or Specifications: The Contractor may at any time by a written order and without notice to Subcontractor's sureties make changes in the plans, drawings and/or specifications of this Subcontract and within the general scope thereof. If such changes cause an increase or decrease in the compensation due under this Subcon-

tract and/or in the time required for its performance an adjustment shall be made and the Subcontract shall be modified in writing accordingly. If the Subcontractor does not approve of the adjustment in the amount due under this Subcontract and/or in the time required for its performance, he shall so notify Contractor within ten (10) days of the receipt by Subcontractor of notice of the amount of the proposed adjustment. The work shall, nevertheless, proceed in accordance with the order for changes and the adjustment of compensation and time shall be subsequently settled by negotiations between the parties. In determining the adjustment of compensation, unit prices appearing on the face of this Subcontract will govern in so far as applicable to the extra work and/or changes.

Subcontractor shall not be entitled to any payment for extra work and/or changes performed in connection with the work provided for herein, unless such work shall have been authorized in writing by Contractor and approved by the United States Maritime Commission.

Article 9. Records, Accounts and Audits: Subcontractor agrees to keep one complete set of records and books of account on a recognized cost accounting basis satisfactory to the United States Maritime Commission and Contractor, showing the actual costs of Subcontractor of all items of labor, materials, equipment, supplies, services and other expenditures, of whatever nature, made pursuant to the provisions of this Subcontract.

The United States Maritime Commission and Contractor shall at all times be afforded proper facilities for the inspection and/or auditing of all books, correspondence, records, instructions, plans, drawings, specifications, vouchers and memoranda of every description, of Subcontractor pertaining to the work hereunder.

Article 10. Subcontractor Not Agent of Contractor: In the execution of the work provided for herein Subcontractor shall operate as an independent Contractor and not as the agent of Contractor.

Article 11. Superintendence: Subcontractor agrees to designate, appoint and maintain a competent Superintendent who, on behalf of Subcontractor, shall have complete charge of all work under this Subcontract. Subcontractor shall promptly advise Contractor in writing, giving the name, address and telephone number (day and night) of such designated Superintendent and of any changes from time to time in such superintendence.

Article 12. Performance of Work: Subcontractor agrees to proceed with the work to be performed under this Subcontract and each and every part and detail thereof, in the best and most workmanlike manner by qualified, careful and efficient worker and agrees to do the several parts thereof at such time and in such order as Contractor may direct and agrees to finish such work in strict conformance with said plans, drawings and/or specifications, or any changes, modifications or amplifications thereof made by Contractor.

If the work done under this Subcontract proves to be defective as to material and/or workmanship furnished by the Subcontractor, the Contractor shall notify the Subcontractor and may at its discretion give the Subcontractor a reasonable opportunity to correct or remedy such defects by repair or replacement or may reject such defective materials and/or workmanship and replace them at the expense of the Subcontractor and deduce the amount of such expense from any amounts due under this Subcontract. In no event shall Contractor be precluded from pursuing any other remedy which may be available against Subcontractor for such defective material or workmanship.

Article 13. Hours of work:

A. If the work to be carried on under this Subcontract is specified on the face hereof as Facilities or Maintenance A (not an integral part of Contractor's vessels construction schedule), then:

Subcontractor shall carry on his work six (6) days per week, legal holidays excepted, and one shift per day, not to exceed ten (10) hours for such shift. If, in order to complete the work provided by this Subcontract within the time specified for completion, it is necessary for Subcontractor's operations to be carried on more than six (6) days per week, more than one shift per day, and/or in excess of ten (10) hours per shift, no additional compensation shall be paid to Subcontractor for such work.

If, however, Contractor for his own purposes requires that Subcontractor's operations be carried on more than six (6) days per week, or on legal holidays and/or more than one shift per day, and/or in excess of ten (10) hours per shift, an Extra Work Order covering the additional wages, taxes, and compensation insurance shall be issued subject to the approval of the United States Maritime Commission.

B. If the work to be carried on under this Subcontract is specified on the face hereof as Vessels or Maintenance B (an integral part of Contractor's vessels construction schedule), then:

When necessary to keep apace with Contractor's progress under Contractor's vessels construction schedule, Subcontractor's operations hereunder shall be carried on seven (7) days per week including Saturdays, Sundays, and/or Holidays, on a one (1), two (2), and/or three (3) shift basis, and/or in excess of eight (8) hours per shift. No additional compensation shall be paid because of the necessity of performing work at other than the regular hours of work, which are defined as the hours during which no overtime or shift premium need be paid.

Article 14. Inspection: Subcontractor agrees that representatives of the United States Maritime Commission or of the Contractor, or any person appointed by Contractor or by the United States Maritime Commission, will be permitted to visit and inspect said work, or any part thereof, at all times and places during the progress of the work, and Subcontractor agrees to provide sufficient, safe and proper facilities for such inspection. All mate-

rials and workmanship supplied in the performance of this Subcontract shall be subject to inspection and tests and approval by the Contractor at any and all times during the manufacture or construction and at any and all places where such manufacture or construction is carried on. The Contractor shall have the right to reject materials and workmanship determined by it to be defective, and require correction and replacement thereof, at no expense to the Contractor.

Article 15. Delays and Extensions: The time during which Subcontractor is delayed in the performance of work hereunder by the acts of omission or commission of Contractor or of the employees or agents of the Contractor, or by the acts of God, or by the elements which Subcontractor could not reasonably foresee and provide against, or by other causes beyond Subcontractor's control, including without limitation shortage of materials or equipment, (provided that the Subcontractor has ordered all necessary materials and equipment at the proper times and used reasonable effort to obtain delivery of such materials and equipment at the time and in the order required to carry on the work properly) strikes, boycotts, or like obstructive action by employees or labor organizations, or lockouts, or other defensive action by other employers, whether general or individual, or by organization of other employees, shall be added to the aforesaid time of completion of said work, provided Subcontractor gives prompt written notice to the Contractor of the event causing such delay.

Subcontractor shall not be entitled to, and does hereby waive any and all damages other than those compensable under Article 16, entitled "Suspension for Convenience," which it may suffer by reason of Contractor hindering or delaying Subcontractor in the progress of said work, or any portion thereof.

Article 16. Suspension for Convenience: The Contractor for his own convenience or for that of the United States Maritime Commission may suspend this Subcontract in whole or in part at any time by one day's written or telegraphic notice to the Subcontractor. Such notice shall state the extent and the effective date of such suspension, and on the effective date thereof Subcontractor shall promptly suspend such work to the extent specified and during the period of such suspension shall properly care for and protect all work and materials, housing and equipment or hand for construction under this Subcontract. Subcontractor also shall promptly supply the Contractor copies of all outstanding orders for materials, equipment and services, and shall take such action relative to such orders as may be directed by the Contractor. If the performance of the work is thus suspended, Subcontractor shall be entitled to be reimbursed for all additional expenses incurred by reason of such suspension as agreed upon by Contractor and Subcontractor and approved by the United States Maritime Commission.

Article 17. Termination for Convenience:

A. The Contractor may, for his own convenience or that of the United States Maritime Commission terminate work under this Subcontract in whole or in part at any time by one day's written or telegraphic notice to the Subcontractor. Such notice shall state the extent and effective date of such termination; and on the effective date thereof the Subcontractor will, as and to the extent directed by the Contractor, stop work under this Subcontract and the placement of further orders or subcontracts hereunder, terminate work under orders and subcontracts outstanding hereunder, and take any necessary action to protect property in the Subcontractor's possession in which the Contractor has or may acquire an interest. If partial termination of this order results in any increase in the unit cost of articles or services to be completed thereafter, the Subcontractor may promptly request, and the Contractor will make an appropriate, fair and reasonable adjustment in the price of such articles or services.

B. If the parties cannot agree by negotiation within a reasonable time upon the amount of fair compensation to the Subcontractor for such termination, the Contractor in addition to making prompt payment for articles delivered or services rendered prior to the effective date of termination will pay to the Subcontractor the following amounts without duplication:

- (1) The contract price for all articles or services which have been completed in accordance with this Subcontract and not previously paid for;
- (2) (i) The actual costs incurred by the Subcontractor which are properly allocable or apportionable under recognized commercial accounting practices to the terminated portion of this Subcontract including the cost of discharging liabilities which are so allocable or apportionable, and (ii) a sum equal to 2% of the part of such costs representing the costs of articles or materials not processed by the Subcontractor, plus a sum equal to 8% of the remainder of such costs, but the aggregate of such sums shall not exceed 6% of the whole of such costs. For the purpose of subdivision (ii) such costs shall exclude the cost of discharging liabilities for parts, materials and services not rendered by the Subcontractor before the effective date of termination;
- (3) The reasonable costs of the Subcontractor in making settlement hereunder and in protecting property in which the Contractor has or may acquire an interest;
- (4) Payments made under this paragraph (b), exclusive of payments under subparagraph (3) shall not exceed the aggregate price specified in this order, less payments otherwise made or to be made.

C. With the consent of the Contractor, the Subcontractor may retain at an agreed price or sell at an approved price any

completed articles, or any articles, materials, work in process, or other things the cost of which is allocable or apportionable to this order under paragraph (b) (2) above, and will credit or pay the amounts so agreed or received as the Contractor directs. As directed by the Contractor, the Subcontractor will transfer title to, and make delivery of any such articles, materials, work in process or other things not so retained or sold with appropriate adjustment to cover costs of delivery.

D. Any adjustment, settlement, and/or payment made or to be made under this Article 17 is subject, without limitation, to the prior approval of the United States Maritime Commission.

E. Contractor may at any time after cancellation, in whole or in part, take over all or part of the work and prosecute the same to completion by contract or otherwise and may take possession and utilize in completing the work such materials, appliances and plants as may be on the site of the work and necessary for completion of the work. The costs which Subcontractor incurs by reason of Contractor's taking over the work shall be included in the computation of costs referred to above.

F. The provisions of this Article 17 shall not limit or affect the right of the Contractor to terminate this order for the default of the Subcontractor.

Article 18. Default: The following shall constitute events of default under this Subcontract:

(a) Failure of the Subcontractor in any respect to use due diligence in proceeding with the performance of the work required under this Subcontract or failure to perform any of the covenants on its part to be performed hereunder, provided that Contractor in either instance shall give written notice to Subcontractor as to such failure or breach (The Contractor may accept delayed deliveries from or performance by Subcontractor without thereby waiving its right to demand strict compliance with the delivery or performance schedule set forth in this Subcontract with respect to all other deliveries or work);

(b) The filing by the Subcontractor of a petition in bankruptcy, or for reorganization under the Bankruptcy Act, or the entry of an order upon petition against the Subcontractor adjudicating the Subcontractor a bankrupt, or the appointment of a receiver or receivers of the Subcontractor or any property belonging to the Subcontractor necessary for the performance of its obligations under this Subcontract;

(c) The failure of the Subcontractor to pay when due any charge for labor, material, or services in connection with work under this Subcontract.

Article 19. Termination for Default: Upon the occurrence of any events of default set forth in Article 18 hereof, Contractor may terminate this Subcontract by written or by telegraphic notice to Subcontractor. In the event of termination of this Subcontract pursuant to this article, the Contractor and/or the United States Maritime Commission may enter the plant of the Subcon

tractor and take possession of all materials to be furnished under this Subcontract, either completed or uncompleted, and any apparatus, merchandise, equipment, fittings and supplies theretofore or thereafter delivered at the plant of the Subcontractor to be incorporated in the work covered by this Subcontract, together with all plans, specifications, calculations and other records required for the performance of the work. Contractor may complete the performance of any work with respect to which Subcontractor defaulted and any excess in cost over the subcontract price stipulated herein and adjustments, if any, shall be charged to the Subcontractor; provided, however, that any action taken by Contractor shall not affect or impair any rights or claims of the Contractor to damages for breach by the Subcontractor of any of the conditions of this Subcontract.

Article 20. Terms of Payment:

Unless otherwise qualified on the face hereof:

A. If the work to be carried on under this Subcontract is classified as Facilities or Maintenance A (not an integral part of Contractor's vessels construction schedule), then:

Contractor at the close of each month, through duly authorized representatives, shall estimate the value of work done and materials furnished by Subcontractor during such month and Contractor shall pay to Subcontractor in accordance with Contractor's usual practice of vouchering accounts, ninety (90) per cent of the amount estimated to be due Subcontractor for that month. The remaining ten (10) per cent of such amount shall be paid Subcontractor by Contractor thirty-five (35) days after completion and acceptance by the Contractor of the work provided for herein.

All estimates herein provided for shall be made by Contractor's Engineer, whose measurements and calculations as to the quantities and amounts of work performed shall be final, conclusive and binding upon the parties hereto.

B. If the work to be carried on under this Subcontract is classified as Vessels or Maintenance B (an integral part of Contractor's vessels construction schedule), then:

Contractor shall pay to Subcontractor the amount due Subcontractor for each Vessel for which Subcontractor has completed the work specified on the face hereof within fifteen (15) days after delivery to and acceptance of such Vessel by the United States Maritime Commission.

Article 21. Acceptance of Work: It is mutually agreed that no payment made under this Subcontract, except the final payment, shall be evidence of the performance of this Subcontract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective or improper materials.

Article 22. Patent Rights: It is mutually agreed that Subcontractor shall pay all claims growing out of any use or infringement of patent rights covering work under this Subcon-

tract, or any part thereof, or of any tools, implements or appliances used on or in connection with said work, including their use by or for the Contractor and/or the United States Maritime Commission after installation, and Subcontractor agrees fully to reimburse Contractor and/or the United States Maritime Commission for any royalties, damages, attorneys' fees, or other payments that Contractor and/or the United States Maritime Commission shall be called upon or be obligated to pay by virtue of any use or infringement of such patent rights, originating or growing out of said work or any part thereof, or of any tools, implements or appliances used on or in connection therewith.

Article 23. Bond: If required by this Subcontract, as indicated on the face of this Subcontract, Subcontractor agrees to furnish two separate bonds, one for "Performance" coverage in the amount of 50% of the Subcontract compensation, and the other for "Payment" coverage in the amount of 50% of the Subcontract compensation, the two together being equal to 100% of the Subcontract compensation. The latest revision of Government Standard Form 25 ("Performance") and Form 25-A ("Payment") shall be used, and the bonds shall be issued by a bonding company on the approved list of the Treasury Department (Form 356). The United States Maritime Commission as well as the Contractor shall be named as Obligee on the bonds. Such bonds shall be executed and delivered to the Contractor before any work is commenced under this Subcontract. Subcontractor shall pay and solely bear the cost of all premiums on such bonds.

Article 24. Insurance:

A. In view of Article 25 hereof Subcontractor should for his own protection carry adequate Public Liability Insurance, Property Damage Insurance, Automobile Public Liability Insurance, Automobile Property Damage Insurance, and Workmen's Compensation Insurance.

B. This Subcontract is subject to the provisions of the Act of June 25, 1936 (Public No. 814), entitled "An Act to provide more adequate protection to workmen and laborers on project buildings, constructions, improvements, and property wherever situated, belonging to the United States of America, by granting to the several States jurisdiction and authority to apply the State Workmen's Compensation laws on all property and premises belonging to the United States of America."

Article 25. Liability for Third Party Claims: Subcontractor expressly agrees to indemnify and save harmless Contractor and/or the United States Maritime Commission from and against any and all claims, other than claims of the Subcontractor, Contractor, or the United States Maritime Commission, arising directly or indirectly out of work to be performed under this Subcontract.

Article 26. Liens: Subcontractor expressly agrees to discharge at once all liens which may be filed in connection with said work and hold harmless therefrom the Contractor, the United States Maritime Commission and the owners of the premises upon which the work is to be performed.

Article 27. Subcontractor to Remove Debris and Waste Materials: Upon termination or completion of said work Subcontractor shall remove all debris and waste material and leave the premises in a neat and clean condition, all to the satisfaction of the Contractor.

Article 28. Assignment: This Subcontract shall not be assigned, sublet or transferred in whole or in part by Subcontractor, nor shall Subcontractor assign any moneys due or to become due, without prior written consent of Contractor; and any attempted assignment hereunder without the previous written consent of Contractor shall be void. No drafts for subcontracted work will be allowed.

Article 29. Attorneys' Fees: Subcontractor hereby agrees to pay to Contractor a reasonable sum as attorneys' fees in all court actions brought by either of them against the other or in which they are both plaintiffs or defendants, and also in court actions involving offsetting claims between Subcontractor and Contractor, because of any doubts, disputes or actions arising out of this Subcontract, except in the following cases:

(a) When Subcontractor obtains a favorable net judgment against Contractor, after consideration of claims and offsets of Contractor which are allowed by the court against Subcontractor, for breach of this Subcontract;

(b) When Contractor is denied a favorable judgment by a court in any suit against Subcontractor which may be brought by Contractor.

Article 30. Risk of Loss and Title to Property: Title to all vessels, facilities, buildings or structures completed or in the course of construction, and title to all materials, equipment or supplies, whether paid for or not, delivered to the job site or approved storage site to be incorporated in the completed projects and/or vessels shall be in the Commission, and any risk of loss or damage to any such property shall be borne by the Commission. Title to any materials, machinery, or equipment, to the extent the Contractor makes payment therefor, even though such materials, machinery, or equipment have not been delivered to the site of the work, and even though the work under this Subcontract has not been completed by the Subcontractor, shall vest in the Commission immediately on such payment being made, provided, however, that the Subcontractor will hold the Contractor and/or the Commission free from any loss or damage to any such property prior to delivery to the job site or approved storage site. The provisions as to title being vested in the Commission shall not operate to relieve the Subcontractor from any

duties imposed under the terms of this Subcontract, nor shall they be construed as an admission that Contractor is obligated to pay for material, machinery or equipment other than set forth in Article 17 or prior to delivery to the job site. Unless it is otherwise provided on the face of this Subcontract, no insurance shall be carried by Subcontractor covering property, as to which risk of loss, as provided herein, is in the Commission.

Article 31. Union Conditions: Contractor has heretofore entered and may hereafter enter into agreements with the Building and Construction Trades Department and the Metal Trades Department of the American Federation of Labor and with certain International and Local Unions affiliated with such Departments, providing that all workmen, with certain exceptions stated in said agreements, shall be employed only from and through such Unions and fixing the wages, hours and working conditions applying to such employment. Subcontractor agrees to abide by the terms of the said Union Agreements and Governmental Regulations, in so far as they may be applicable to him.

Article 32. Wage Rates:

A. If this Subcontract be for maintenance or for vessels construction, and hence covered by Contractor's Vessels Contracts, then in performance of the work hereunder Subcontractor shall pay wage rates corresponding to the scale of wages prevailing in the shipyard of Contractor for the crafts involved. The only exceptions to the payment of the foregoing rates shall be made in the case of certain classes of work which by reason of their technical or specialized nature are not ordinarily performed in the shipyards of Contractor and where it is the established practice of Contractor to subcontract such work. In such case Subcontractor shall pay the wage rates normally prevailing between himself and his employees for such specialty trade.

B. The Subcontractor and any subcontractors under him shall pay all mechanics and laborers employed on work under this Subcontract and directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at the time of payment, computed at wage rates not less than those provided in the agreement with the Unions, as set forth under Article 31 hereof, or less than those which may be determined by the Secretary of Labor pursuant to the provisions of the Act approved March 3, 1931 (46 Stat. 1494) (Davis-Bacon Act) to be the prevailing rates for the various classes of such laborers and mechanics; and the scale of wages to be paid shall be posted by the Subcontractor in a prominent and easily accessible place at the site of the work. The Contractor and/or the United States Maritime Commission shall have the right to withhold from the Subcontractor, and from subcontractors under him, so much of the accrued payments as may be considered necessary by the Contractor and/or the United States Maritime Commission to pay to laborers and mechanics employed by the Subcontractor, or to

any other subcontractors on the work, the difference between the rates of wages required to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to subcontractors or their agents.

Article 33. Eight-Hour Law—Overtime Compensation :

(a) If the work performed hereunder is pursuant to Contractor's Facilities Contract with the United States Maritime Commission, no laborer or mechanic doing any part of the work contemplated by this Subcontract, in the employ of the Subcontractor, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this Article. The wages of every laborer and mechanic employed by the Subcontractor shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this article a penalty of \$5.00 shall be imposed upon the Subcontractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this article and all penalties thus imposed shall be withheld by the Contractor for use and benefit of the Government; provided that this stipulation shall be subject in all respects to the exceptions and provisions of the U. S. Code, Title 40, Sections 321, 324, 325 and 326, relating to hours of labor, as in part modified by the provisions of Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to Compensation for Overtime.

(b) Unless otherwise provided by law, provisions of law prohibiting more than eight (8) hours of labor in any one day of persons engaged upon work covered by the Contractor's Vessels Contracts with the United States Maritime Commission shall, in accordance with the provisions of the Act approved October 10, 1940 (Public No. 831, 76th Cong.) be suspended.

Article 34. Labor Statistics and Kickback Statute :

1. The Subcontractor will report monthly within five (5) days after the close of each calendar month, on forms to be furnished by the United States Department of Labor,—(1) the number of persons on its payroll, (2) the aggregate amount of such payrolls, (3) the man-hours worked, and (4) the total expenditures for materials; provided, however, that the requirements of this paragraph shall be applicable only to work done at the site of the Construction project.

B. Subcontractor shall make and file all affidavits concerning rates of pay for labor, etc., and will otherwise comply with the

regulations promulgated by the Secretary of Labor pursuant to the provisions of the Act approved June 13, 1934 (40 U.S.C. 276 (b) and (c)). In compliance with the above, the Subcontractor agrees to furnish the Contractor with triplicate copies of all payrolls of the Subcontractor and of his own subcontractors for work performed on the site. In addition a triplicate appointment affidavit giving the representative of the Subcontractor and representatives of the Subcontractor's subcontractors the authority to certify payrolls must be supplied. With each set of triplicate payrolls triplicate certifications must be properly executed and attached. The affidavit forms will be supplied by the Contractor.

Article 35. Affidavits: The Contractor may, if the United States Maritime Commission so directs, require any person, paid from any funds made available under this Subcontract, to execute and to file an affidavit in such form as to satisfy the requirements of Public Law No. 5 and/or No. 23 (77th Congress); but the execution and filing of such affidavit shall be without prejudice to the rights of the Contractor to require such further evidence in the premises as it may deem desirable.

Article 36. Arbitration: Doubts or disputes arising under this Subcontract between the Contractor and Subcontractor shall be submitted to the Regional Director, West Coast Region of the United States Maritime Commission, or if there be no such Director then to the United States Maritime Commission, or to such representative or representatives of the United States Maritime Commission as the Regional Director or the United States Maritime Commission, as the case may be, may designate for arbitration and determination. The decision of the arbitrator or arbitrators shall be final and conclusive as to the parties hereto.

Article 37. Convict Labor: The Subcontractor shall not employ upon the work covered by this Subcontract any person undergoing sentence of imprisonment.

Article 38. Removal of Employees: The Contractor may require the removal or discharge of any person employed in or about the Contractor's facilities if it determines that the employment of such person is detrimental to the performance of the work under the contracts with the United States Maritime Commission specified on the face hereof.

Article 39. No Discrimination: The Subcontractor agrees that it will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin and further agrees that it will include a provision similar to this provision in all subcontracts.

Article 40. Domestic Preference: In the performance of the work covered by this Subcontract the Subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials and supplies as have been mined or produced in the United States, and only such manufactured articles, material and supplies as have been manufactured in the United States.

substantially all from articles, materials or supplies mined, produced or manufactured, as the case may be, in the United States; the foregoing provision shall not apply to such articles, materials or supplies of the class or kind to be used or such articles, materials or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the Department under the proviso of Title III, Section 3, of the Act of Congress approved March 3, 1933 (41 U.S.C. 10).

Article 41. Defense Clause: The Subcontractor shall take all reasonable precautions to prevent the employment on the work covered hereby of such persons as are prohibited from employment in, and/or entry into, any shipyard, plant or vessels under prohibitions of the United States Navy Department or the United States Maritime Commission.

The Subcontractor further agrees to take all reasonable measures to protect the work to be performed hereunder from sabotage. The Subcontractor further agrees to report to the United States Authorities and to the Contractor any information coming to the attention of the Subcontractor which indicates that any danger of sabotage exists or that any act of sabotage has been committed.

Article 42. Information Confidential: All plans, drawings, specifications and/or information given Subcontractor in connection with performance of this Subcontract shall be held confidential by the Subcontractor and shall not be used for any purposes other than those for which they have been supplied or prepared. The Subcontractor agrees that, as far as possible, it will keep confidential the making of this Subcontract and the terms hereof.

Article 43. Principal Contract Included in Subcontract: In the performance of this Subcontract, Subcontractor binds himself to the Contractor and to the United States Maritime Commission to comply fully with all the undertakings and obligations of the Contractor (excepting such as do not apply to the Subcontractor's work), under the facilities and/or vessels contracts with the United States Maritime Commission specified on the face hereof, which are hereby adopted and made a part of this Subcontract. Subcontractor is hereby advised that copies of said principal contracts are available for his inspection at the Contractor's offices at Richmond, California.

Article 44. Contract to Inure to Benefit of United States Maritime Commission: If prior to the completion of this Subcontract the United States Maritime Commission shall take over the facilities hereinabove mentioned, this Subcontract shall inure to its benefit and shall be completed in the same manner as if this Subcontract had been made with the United States Maritime Commission in the first instance.

Article 45. Price and Rate Regulations: Subcontractor represents, warrants, certifies and agrees that the rates and/or price or prices established herein do not and will not exceed the maximum rates and/or price or prices chargeable and payable under the regulations of the Office of Price Administration, and are not and will not be in excess of the maximum, and are not and will not be less than the minimum chargeable and payable under any other applicable State, Federal or other governmental legislation or regulations, and that all other requirements of the Office of Price Administration have been complied with. In the event any revision of such legislation or regulations or any subsequent applicable legislation or regulations conflict and/or conflicts with the provisions of this Subcontract, such conflicting provisions shall be deemed to be modified to conform therewith. Subcontractor agrees to reimburse and/or pay to the Contractor, or its assigns, all moneys paid hereunder in excess of the maximum rates and/or price or prices chargeable and payable under any such legislation or regulations.

Article 46. Renegotiation: In the event that the main contract under which this Subcontract was made was executed before April 28, 1942, or in the event that the main contract under which this Subcontract was made was executed on or after April 28, 1942, and this Subcontract is for an amount equal to or less than \$100,000.00, and this Subcontract is renegotiated under the provisions of Section 403 of Public Law 528 (77th Cong.) approved April 28, 1942 (Sixth Supplemental National Defense Appropriation Act, 1942), as amended by Title VIII of Public Law 753 (77th Cong.), approved October 21, 1942 (Revenue Act of 1942), the Subcontractor hereby agrees with the Contractor

1. That if such renegotiation results in a reduction of the contract price of this Subcontract, the amount of such reduction shall, as directed by the Chairman of the United States Maritime Commission, hereinafter at times referred to as the Chairman of the Commission.
 - (a) Be deducted by the Contractor from payments to the Subcontractor under this Subcontract; or
 - (b) Be paid by the Contractor directly to the *Government*; or
 - (c) Be repaid by the Subcontractor to the Contractor.
2. That the Contractor shall not be liable to the Subcontractor for or on account of any amount repaid to the Contractor or paid to the *Government* by the Subcontractor or deducted by the Contractor from payment under this Subcontract, pursuant to directions from the Chairman of the Commission in accordance with the provisions hereof, and the Subcontractor will pay to the Contractor all amounts withheld by the *United States* from the Contractor and all amounts paid to the *United States* by the Contractor, as a result of such renegotiation.

3. That the term "Chairman of the Commission" for the purpose hereof, shall be deemed to include any authorized representative of the United States Maritime Commission.

In the event that the main contract under which this Subcontract was made was executed on or after April 28, 1942, and prior to March 26, 1944, and this Subcontract is for an amount in excess of \$100,000.00, pursuant to the provisions of Section 403 of Public Law 528 (77th Cong.) approved April 28, 1942 (Sixth Supplemental National Defense Appropriation Act, 1942), as amended by Title VIII of Public Law 753 (77th Cong.), approved October 21, 1942 (Revenue Act of 1942), the Subcontractor hereby agrees with the Contractor:

1. That the Chairman of the Commission may renegotiate the contract price of this Subcontract at a period or periods when, in his judgment, the profits derived or to be derived hereunder can be determined with reasonable certainty; and
2. That the Contractor may retain for the Commission the amount of any reduction in the contract price of this Subcontract pursuant to its renegotiation hereunder, or the Subcontractor will repay to the Commission any excess profits from this Subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Chairman of the Commission may direct; and
3. That the Contractor shall have no liability to the Subcontractor on account of any amount so retained by the Contractor or repaid by the Subcontractor to the Commission pursuant to the provisions of subparagraph 2 hereof; and
4. That, in the discretion of the Chairman of the Commission, the Subcontractor will insert in any subcontract made by him under this Subcontract, provisions corresponding to those of subparagraphs 1 to 5, inclusive, hereof; and
5. That the Commission may retain from amounts otherwise due the Contractor, or the Contractor shall repay to the Commission, as the Chairman of the Commission may direct, the amount of any reduction in the contract price of any subcontract under this Subcontract, which the Contractor is directed, pursuant to the provisions of subparagraphs 1 to 4, inclusive, hereof, to withhold from payments otherwise due to the Subcontractor and actually unpaid at the time the Contractor receives such direction; and
6. That the Contractor shall not be liable to the Subcontractor for or on account of any amount retained by the Commission or by the Contractor for the Commission, or

repaid by the Contractor or the Subcontractor to the Commission, pursuant to directions from the Chairman of the Commission in accordance with the provisions hereof, and the Subcontractor will pay to the Contractor all amounts paid to the Commission by the Contractor as a result of such renegotiation; and

7. That the term "Chairman of the Commission" for the purposes hereof shall be deemed to include any authorized representative of the United States Maritime Commission.

In the event that the main contract under which this Subcontract was made was executed on or after March 26, 1944, this Subcontract shall be deemed to contain all the provisions required by subsection (b) of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended by Section 701 of the Revenue Act of 1943.

Article 47. Liquidated Damages: If liquidated damages are provided for on the face of this Subcontract then the following provision is hereby agreed upon by the Contractor and the Subcontractor:

The damages that may result from any delay in completion of the work by the time agreed upon will be difficult, if not impossible, of ascertainment. If the work is not completed on or before the date fixed for its completion by the terms of the Subcontract the Subcontractor shall pay to the Contractor as fixed, agreed and liquidated damages the sum specified on the face of this Subcontract for each calendar day's delay until the work is satisfactorily completed or until such time as the Contractor may reasonably procure the completion of the work by another Subcontractor or complete the work itself. Whatever sums may be due as liquidated damages for delay may be deducted from payment due to the Subcontractor or may be collected from the Subcontractor or the Subcontractor's surety or sureties. This provision for liquidated damages shall not be construed so as to in any manner interfere with, terminate, or require the exercise of the rights given to the Contractor under this Subcontract, including without limitation, those rights set forth in Article 17-E covering "taking over of work after cancellation."

EXHIBIT B

Addendum No. 1 to Subcontract No. VS-14

MCc-15762

Hulls Numbered 557 to 573

This Agreement made and entered into this 10th day of August, 1944, by and between The Permanente Metals Corporation, Shipbuilding Division, Richmond, California, hereinafter called "Contractor," and Birnie Electric Company, with offices located at 816 West 5th Street, Los Angeles, California, hereinafter called "Subcontractor."

Witnesseth:

Whereas, the parties hereto have heretofore on the 29th day of May, 1944, entered into Subcontract No. VS-14, whereby said Subcontractor was required to supply certain materials and to fabricate and install the Degaussing System, Radar, Voice Tube, Mechanical Telegraph and Mechanical Wireways on five (5) AP-5 Design Vessels, numbered 552 to 556, inclusive; and

Whereas, it is Contractor's desire to have Subcontractor perform similar work on seventeen (17) additional AP-5 Design Vessels, numbered 557 to 573, inclusive, under Prime Contract No. MCc-15762;

Now, Therefore, It Is Agreed Between the Parties Hereto:

1. Subcontractor shall perform all of the work specified in said Subcontract No. VS-14 on seventeen

(17) additional AP-5 Design Vessels, numbered 557 to 573, inclusive, under Prime Contract No. MCC-15762.

2. Contractor agrees to pay Subcontractor the same consideration for the work herein specified as provides in said Subcontract No. VS-14; provided, however, that Subcontractor's costs shall be determined on the completion of the fifth, thirteenth, and twenty-second vessels in accordance with provisions of said Subcontract No. VS-14 and outstanding amounts, if any, found to be due the Subcontractor for the work performed on such vessels shall be paid within fifteen (15) days after such determination. Such determination shall be final for the vessels completed and the profits on such vessels shall not be considered for determination of profits on subsequent vessels.

3. You are required to furnish evidence that the penal sums in bonds heretofore furnished are adjusted upward so that each will be 50% of the new total contract price.

4. Except as herein otherwise provided all of the terms and conditions of said Subcontract No. VS-1 shall remain unchanged and in full force and effect.

5. The work required to be performed under this addendum has not been provided for in any previous subcontract, or addenda thereto.

This addendum is subject to the approval of the United States Maritime Commission.

THE PERMANENTE
METALS CORPORATION,
Contractor.

/s/ T. A. BEDFORD,
Assistant General Manager.

BIRNIE ELECTRIC
COMPANY,
Subcontractor.

By /s/ JOHN URQUHART BIRNIE,
Sole Proprietor.

Approved as to Form:

THE PERMANENTE
METALS CORPORATION,

By /s/ LUCAS A. POWER,
Legal Department.

Approved: 9/19/44.

By /s/ C. V. FISHER,
Material Controller.

EXHIBIT C

Addendum No. 2 to Subcontract No. VS-14

MCc-15762

This Agreement made and entered into this 19th day of October, 1944, by and between The Perma-

nente Metals Corporation, Shipbuilding Division, Richmond, California, hereinafter called "Contractor," and Birnie Electric Company, with offices located at 816 West 5th Street, Los Angeles, California, hereinafter called "Subcontractor."

Witnesseth:

Whereas, the parties hereto have previously entered into Subcontract No. VS-14 and Addendum No. 1 thereto whereby Subcontractor was required to perform certain electrical installation work on twenty-two (22) AP-5 Design Vessels, numbered 552 to 573, inclusive, under Prime Contract No. MCc-15762; and

Whereas, complete plans and specifications were not available at the time of entering into Subcontract No. VS-14; and

Whereas, provision was made in the original bid proposal to add additional work upon subsequent plans and specifications becoming available.

Now, Therefore, It Is Agreed Between the Parties Hereto as Follows:

1. The changes and additions set forth in Exhibit "A," approved by the Principal Hull and Machinery Inspectors of the United States Maritime Commission, as necessary under the plans and specifications on hulls numbered 552 to 573, inclusive shall be included herein and made a part of Contract No. VS-14.

2. The compensation provisions of Subcontract

No. VS-14 shall be changed by striking the compensation schedule found in paragraph one of the compensation provision and substitute in lieu of such schedule Exhibit "B" attached hereto and made a part hereof.

3. You are required to furnish evidence that the penal sums in bonds heretofore furnished are adjusted upward so that each will be 50% of the new total contract price.

4. Except as herein otherwise provided the terms and conditions of Subcontract No. VS-14 as amended by Addendum No. 1 shall remain in full force and effect.

5. The work required to be performed under this addendum has not been provided for in any previous subcontract or addenda thereto.

This addendum is subject to the approval of the United States Maritime Commission.

THE PERMANENTE
METALS CORPORATION,
Contractor.

By /s/ T. A. BEDFORD,
Assistant General Manager.

BIRNIE ELECTRIC
COMPANY,

By /s/ JOHN U. BIRNIE,
Owner.

By /s/ OSCAR A. MELLIN,
His Attorney in Fact.

Approved as to Form:

By /s/ R. K. FRISBE,
Contractor's Legal Dept.

Approved: 10/28/44.

UNITED STATES MARITIME
COMMISSION,

By /s/ C. V. FISHER,
Material Controller.

Exhibit "A"

Additions and Changes in Design to Contract VS-14
Birnie Electric Company

Amount

Degaussing

1. Change in design and routing of degaussing system trough and back plates and additional back plates in afterpeak	\$1,085.12
2. Change in design of cleats in forepeak	342.00
3. Change design of control panels	275.31
4. Changes in design of all penetrations at frame 87 port, frame Nos. 40, 50, 73, 82 and 91 starboard. Pack and seal all penetrations around cables to make rooms fume tight	1,607.97
5. Changes in design of wiring of balancer coils in wheelhouse	350.11
Contract price as shown in VS-14	\$7,725.00
Bond @ \$6.65 per M.	51.37
	<hr/>
	7,776.3
Adjusted Contract price	\$11,437.0

Amount

Radar

1. Fabricate and install foundations for equipment, brackets, and mountings of equipment not shown on plans. Prepare working drawings for same.....	\$2,569.16
2. Additional cables required not shown to accommodate changes in type of equipment.....	848.00
3. Due to Radar equipment being revised continuously by the installation of latest type of equipment continuous contact with U. S. Navy and United States Maritime Commission necessary to change working drawings to accommodate different types of installations	250.00
Contract price as shown in	
Contract VS-14	\$2,983.00
Bond @ \$6.65 per M.	19.84
	<hr/>
	3,002.84
	<hr/>
Adjusted Contract price	\$6,670.00

Voice Tube and Whistle

1. Additional structural members installed. Necessary to re-route voice tube to wheelhouse and bridge.....	\$ 458.20
2. Change in routing of voice tube as per plan S65-4-3-4-Alt. 2	163.49
3. Brazing penetrations to make rooms fume tight.....	32.88
Contract price as shown in VS-14.....	\$666.00
Bond @ \$6.65 per M.	4.43
	<hr/>
	670.43
	<hr/>
Adjusted Contract price	\$1,325.00

Mechanical Telegraph

1. Change in design of brackets	\$ 253.57
2. Change routing of mechanical telegraph in Captain's room	169.04
3. Change routing in machine flat	422.60
4. Change routing in boiler room	845.20
Contract price as shown in VS-14.....	\$2,796.00
Bond @ \$6.65 per M.	18.59
	<hr/>
	2,814.59
	<hr/>
Adjusted Contract price	\$4,505.00

Amount

Mechanical Wireway

1. Bids were taken for enclosure as shown on drawing S62-2-9 October 1, sheet #3.

Wireway was fabricated in Los Angeles and shipped to Sub-contractor.

Main cableways were changed and due to increased mechanical changes beyond the control of the Subcontractor it is necessary for Subcontractor to alter and refit the fabricated material rather than discard and refabricate. Perforated material not available on West Coast and delivery cannot be made in time to complete schedule. By re-fabrication, material available can be used.

This has the approval of Mr. Carl Olson,

Naval Architect\$1,926.84

Contract price as shown in

Contract VS-7\$3,333.00

Bond @ \$6.65 per M. 22.16

3,355.16

Adjusted Contract price\$5,282.00

Approved as to necessity

/s/ JAMES KASTROSKY,
Principal Machinery Inspector.

Approved as to necessity

/s/ CHARLES C. STEWART,
Principal Hull Inspector.

Contract VS-14—Birnie Electric Company

The Permanente Metals Corp., etc.

47

Hull No.	Degaussing	Radar	Voice Tube and Whistle	Mechanical Telegraph	Mechanical Wireways	Subtotal	Bond Premium	Grand Total
552.....	\$11,437.00	\$6,670.00	\$1,325.00	\$4,505.00	\$5,282.00	\$29,219.00	\$194.31	\$29,413.31
553.....	11,437.00	6,670.00	1,325.00	4,505.00	5,282.00	29,219.00	194.31	29,413.31
554.....	11,322.63	6,603.30	1,311.75	4,459.95	5,229.18	28,926.81	192.36	29,119.17
555.....	11,322.63	6,603.30	1,311.75	4,459.95	5,229.18	28,926.81	192.36	29,119.17
556.....	11,208.26	6,536.60	1,298.50	4,414.90	5,176.36	28,634.62	190.42	28,825.04
557.....	11,208.26	6,536.60	1,298.50	4,414.90	5,176.36	28,634.62	190.42	28,825.04
558.....	11,093.89	6,469.90	1,285.25	4,369.85	5,123.54	28,342.43	188.48	28,530.91
559.....	11,093.89	6,469.90	1,285.25	4,369.85	5,123.54	28,342.43	188.48	28,530.91
560.....	10,979.52	6,403.20	1,272.00	4,324.80	5,070.72	28,050.24	186.53	28,236.77
561.....	10,979.52	6,403.20	1,272.00	4,324.80	5,070.72	28,050.24	186.53	28,236.77
562.....	10,865.15	6,336.50	1,258.75	4,279.75	5,017.90	27,758.05	184.59	27,942.64
563.....	10,865.15	6,336.50	1,258.75	4,279.75	5,017.90	27,758.05	184.59	27,942.64
564.....	10,750.78	6,269.80	1,245.50	4,234.70	4,965.08	27,465.86	182.65	27,648.51
565.....	10,750.78	6,269.80	1,245.50	4,234.70	4,965.08	27,465.86	182.65	27,648.51
566.....	10,636.41	6,203.10	1,232.25	4,189.65	4,912.26	27,173.67	180.70	27,354.37
567.....	10,636.41	6,203.10	1,232.25	4,189.65	4,912.26	27,173.67	180.70	27,354.37
568.....	10,522.04	6,136.40	1,219.00	4,144.60	4,859.44	26,881.48	178.76	27,060.24
569.....	10,522.04	6,136.40	1,219.00	4,144.60	4,859.44	26,881.48	178.76	27,060.24
570.....	10,407.67	6,069.70	1,205.75	4,099.55	4,806.62	26,589.29	176.82	26,766.11
571.....	10,407.67	6,069.70	1,205.75	4,099.55	4,806.62	26,589.29	176.82	26,766.11
572.....	10,293.30	6,003.00	1,192.50	4,054.50	4,753.80	26,297.10	174.88	26,471.98
573.....	10,293.30	6,003.00	1,192.50	4,054.50	4,753.80	26,297.10	174.88	26,471.98
Total.....	\$239,033.30	\$139,403.00	\$27,692.50	\$94,154.50	\$110,393.80	\$610,677.10	\$4,061.00	\$614,738.10

EXHIBIT D

Addendum No. 3 to Subcontract No. VS-14

MCc-15762

This Agreement made and entered into this 20th day of November, 1944, by and between The Permanente Metals Corporation, Shipbuilding Division, Richmond, California, hereinafter called "Contractor," and Birnie Electric Company, with offices located at 816 West 5th Street, Los Angeles, California, hereinafter called "Subcontractor,"

Witnesseth:

Whereas, the Company has heretofore entered into Subcontract No. VS-14 and Addenda 1 and 2 thereto with the Birnie Electric Company for the performance of certain electrical work on hulls being constructed at The Permanente Metals Corporation Shipyard Number Two; and

Whereas, certain of said hulls were transferred to Kaiser Co. Inc., Richmond Shipyard Number Three, for outfitting; and

Whereas, it has been deemed expedient to delete from the work to be performed by Subcontractor hereunder all work required to be done on said hulls which are transferred to said Richmond Shipyard Number Three, with the exception of "radar" work on Hulls 568 and 570, which Subcontractor has agreed to do at said Richmond Shipyard Number Three.

Now, Therefore, It Is Agreed Between the Parties Hereto as Follows:

1. Subcontractor agrees to perform the "radar" work on Hulls 568 and 570 while such hulls are being outfitted at Shipyard Number Three, and to the deletion of Hulls 557, 559, 561, 563 and 566 from Subcontract No. VS-14; and also the deletion from Subcontract No. VS-14 of all work on Hulls 568 and 570 with the exception of the "radar" work.

2. Parties further agree that no cancellation fee shall be paid for the deleted hulls and items and that no extra compensation shall be provided for the performance of the "radar" work on Hulls 568 and 570 at Richmond Shipyard Number Three.

3. Except as herein otherwise provided all terms and conditions of Subcontract No. VS-14 as modified by Addenda 1 and 2 thereto shall remain unchanged and in full force and effect.

This addendum is subject to the United States Maritime Commission approval.

THE PERMANENTE
METALS CORPORATION,
Contractor.

By /s/ T. A. BEDFORD,
Assistant General Manager.

BIRNIE ELECTRIC
COMPANY,
Subcontractor.

/s/ JOHN U. BIRNIE,
Owner.

By /s/ W. M. POWER,
His Attorney in Fact.

Approved as to Form:

THE PERMANENTE
METALS CORPORATION,

By /s/ ROGER SAMS,
Legal Department.

Approved: 2/27/45.

UNITED STATES
MARITIME COMMISSION,

By /s/ C. V. FISHER,
Material Controller.

EXHIBIT E

U. S. Standard Form No. 25 (Revised)

Performance Bond
(Construction or Supply)

C-28504

Know all Men by these Presents, That we, Birnie Electric Company of 816 W. 5th Street, Los Angeles 13, California, as Principal, and Massachusetts Bonding and Insurance Company, a corporation established under the laws of the Commonwealth of Massachusetts and having its principal office in Boston in said Commonwealth as Surety are held and firmly bound unto The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear, in the penal sum of Forty-four Thousand Forty-eight & 45/100 (\$44,048.45) dollar

for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with The Permanente Metals Corporation May 29, 1944, for installation of De-gaussing System, Radar System, and all other work covered by Articles 1 to 5 inclusive on face of subcontract (VS-14) on Hulls Nos. 552 to 556, inclusive, a total of five (5) vessels under Prime Contract No. MCe-15762.

Now therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by The Permanente Metals Corporation with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety **being hereby** waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof, the above-bounden parties have executed this instrument under their several seals this 31st day of July, 1944, the name and corporate seal of each corporate party being hereto

affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal] /s/ JOHN URQUHART BIRNIE,
 Individual Principal,
 816 West 5th St.,
 Los Angeles 13, Calif.

In presence of—

 /s/ G. M. CORREO,
 532 North Gerona Ave.,
 San Gabriel, Calif.

 MASSACHUSETTS BONDING
 AND INSURANCE CO.,
 Corporate Surety,
 458 S. Spring Street,
 Los Angeles 13, Calif.

[Seal] By /s/ F. R. ROBINSON,
 Attorney-in-Fact.

Attest:

 /s/ CATHERINE V. WILSON.

The rate of premium on this bond is \$6.65 per thousand.

Total amount of premium charged, \$581.97.

(The above must be filled in by corporate surety)

EXHIBIT F

U. S. Standard Form No. 25 (Revised)

Performance Bond
(Construction or Supply)

C-28589

Know all Men by these Presents, That we, Birnie Electric Company, 816 West Fifth Street, Los Angeles 13, California, as Principal, and The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear, Massachusetts Bonding and Insurance Company, a corporation established under the laws of the Commonwealth of Massachusetts and having its principal office in Boston in the said Commonwealth, as Surety, are held and firmly bound unto the United States of America, hereinafter called the Obligees, in the penal sum of One Hundred Fifty Thousand Seven Hundred Fifty-four and 22/100 (\$150,754.22) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of this Obligation is such that whereas the principal entered into a certain contract, hereto attached, with the Contractor—Permanente Metals Corporation—dated August 10, 1944, for installation of Degaussing System, Radar System, and all other work covered by Articles 1 to 5 inclusive on face of sub-contract (VS-14) on Hulls

Nos. 557 to 573 inclusive, a total of seventeen (17) vessels under Prime Contract No. MCo-15762, as evidenced by addendum No. 1 to VS-14.

Now therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Contractor—Permanente Metals Corporation—with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void otherwise to remain in full force and virtue.

In witness whereof, the above-bounden parties have executed this instrument under their several seals this 28th day of August, 1944, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal] /s/ JOHN URQUHART BIRNIE,
Individual Principal,
816 West 5th St.,
Los Angeles 13, Calif.

In presence of—

/s/ G. M. CORREO,
532 North Gerona Ave.,
San Gabriel, Calif.

MASSACHUSETTS BONDING
AND INSURANCE CO.

Corporate Surety,
458 So. Spring St.,
Los Angeles 13, Calif.

[Seal] By /s/ CHARLES M. RANDALL,
Attorney-in-Fact.

Attest:

/s/ LEILA K. SHERIDAN.

The rate of premium on this bond is \$6.65 per thousand.

Total amount of premium charged, \$1,978.72.

(The above must be filled in by corporate surety)

EXHIBIT G

Massachusetts Bonding and Insurance Company
Home Office, Boston, Massachusetts

Endorsement

Attached to and forming a part of Bond No. C-28504, issued by the Massachusetts Bonding and Insurance Company, on behalf of Birnie Electric Company, of Los Angeles, California, and in favor

of Permanente Metals Corporation and the United States Maritime Commission, as their interests may appear, covering Contract No. MCc-15762, Sub-Contract No. VS-14, and Bond No. C-28589, on behalf of Birnie Electric Company, of Los Angeles, California, and in favor of Permanente Metals Corporation and the United States Maritime Commission, as their interests may appear, covering Addendum No. 1 to Sub-Contract No. VS-14.

It is hereby understood and agreed that said Performance Bonds are increased in the amount of Twenty-five Thousand and No/100ths (\$25,000.00) Dollars, and said Payment Bonds are increased in the amount of Twenty-five Thousand and No/100ths (\$25,000.00) Dollars, being fifty per cent (50%) of Addendum No. 2 in the amount of Fifty Thousand and No/100ths (\$50,000.00) Dollars.

Except as herein specifically modified, the conditions, provisions and limitations of said bonds shall continue unchanged.

Signed, sealed and dated this 31st day of October 1944.

MASSACHUSETTS BONDING
AND INSURANCE CO.

[Seal] By /s/ M. A. TAYLOR,
Attorney-in-Fact.

EXHIBIT H

U. S. Standard Form No. 25 (Revised)

Performance Bond
(Construction or Supply)

Know all Men by these Presents, That we, Birnie Electric Company, as Principal, and Massachusetts Bonding and Insurance Company, a corporation established under the laws of the Commonwealth of Massachusetts and having its principal office in Boston in the said Commonwealth, are held and firmly bound unto The Permanente Metals Corporation and the United States of America represented by the U.S. Maritime Commission as their interests may appear, the penal sum of Eighty-seven Thousand Five Hundred Sixty-six & 38/100ths (\$87,566.38) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Permanente Metals Corporation, et al., October 19th, 1944, for being Addendum #2 covering increase in price on twenty-two (22) ships covered by contract VS-14 and Addendum #1 for twenty-two (22) AP 5 type Vessels, Numbers 552 to 573 inclusive under Prime Contract Number MCo-15762.

Now therefore, "If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said con-

tract during the original term of said contract and any extensions thereof that may be granted by Permanente Metals Corporation, et al., with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue."

In witness whereof, the above-bounden parties have executed this instrument under their several seals this 9th day of November, 1944, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

BIRNIE ELECTRIC CO.

[Seal] By /s/ JOHN URQUHART BIRNIE,
Individual Principal,
816 West 5th Street,
Los Angeles 13, Calif.

In presence of—

/s/ G. M. CORREO,
532 No. Gerona Ave.,
San Gabriel, Calif.

MASSACHUSETTS BONDING
AND INSURANCE CO.

Corporate Surety,

458 S. Spring Street,

Los Angeles 13, Calif.

[Seal] by /s/ CHARLES M. RANDALL,
Attorney-in-Fact.

Attest:

CATHERINE V. WILSON.

The rate of premium on this bond is \$6.65 per thousand.

Total amount of premium charged, \$1,500.31.

(The above must be filled in by corporate surety)

[Endorsed]: Filed July 20, 1946.

[Title of District Court and Cause.]

ANSWER OF JOHN URQUHART BIRNIE
AND MASSACHUSETTS BONDING AND
INSURANCE COMPANY, A CORPORA-
TION

Comes now John Urquhart Birnie, an individual doing business as Birnie Electric Company and Massachusetts Bonding and Insurance Company, a corporation, and severing from all other defendants in this action and answering the complaint of the plaintiff on file herein, and for answer to the alleged

first cause of action of plaintiff's complaint, admit, deny and allege:

I.

Admit the allegations contained in Paragraph I of the alleged first cause of action of plaintiff's complaint.

II.

Admit the allegations contained in Paragraph II of the alleged first cause of action of plaintiff's complaint.

III.

Admit the allegations contained in Paragraph III of the alleged first cause of action of plaintiff's complaint.

IV.

Answering Paragraph IV of the alleged first cause of action of plaintiff's complaint, defendants allege that they, or either of them do not have sufficient information or belief to enable them to answer said allegations and basing their denial upon said lack of information and belief, deny generally and specifically, each and every, all and singular the allegations therein contained.

V.

Admit the allegations contained in Paragraph V of the alleged first cause of action of plaintiff's complaint.

VI.

Admit the allegations contains in Paragraph V of the alleged first cause of action of plaintiff's

complaint and in that connection defendants allege that on or about November 28, 1944, plaintiff and defendant, John Urquhart Birnie doing business as Birnie Electric Company, made and entered into a certain subcontract in writing designated "Vessels Subcontract No. VS-28" and on April 5, 1945, said parties entered into Addendum No. 1 to said subcontract VS-28, all under United States Maritime Commission Prime Contract No. MCc-15762 which was previously entered into between plaintiff and the United States Maritime Commission. Said subcontract VS-28 was subject to the approval of the United States Maritime Commission and was duly approved by the United States Maritime Commission in writing on or about January 17, 1945. True copies of said subcontract and Addendum No. 1 thereto are attached hereto, marked Exhibit "A" and by reference hereby made a part hereof as though fully set forth herein. Defendants allege that said Addendum No. 1 purports on its face to be executed under and in connection with Prime Contract No. MCc-36452, whereas, in truth and in fact said Addendum No. 1 was executed under and in connection with Prime Contract No. MCc-15762 and was so intended by the parties to said Addendum and said reference therein to Prime Contract MCc-26452 was an inadvertence, misconception and mistake of fact on the part of both parties thereto when executing said Addendum No. 1 to said subcontract VS-28. Defendants further allege that under Vessels Subcontracts Nos. VS-14 and VS-28, by virtue of Article 43 of the "Terms and Conditions"

thereof, all of the terms, covenants and conditions of Prime Contract No. MCc-15762 between the United States Maritime Commission and the plaintiff were adopted, incorporated and made part and parcel of the terms, covenants and conditions of said subcontracts. Said Prime Contract No. MCc-15762, as defendants are informed and believe, and upon such information and belief, allege, was negotiated, made, executed and delivered upon the special instance and request and for the benefit of the United States Navy, acting by and through the Secretary of Navy, his authorized agents, assistants, and employees as a part of and in connection with the emergency naval construction program, authorized by the laws of the United States among which was and is Section 496, Title 34, U. S. C., as amended. The said prime contract and each of said subcontracts contemplated and provided for the construction of complete naval vessels which were intended for and were actually used, employed and commissioned by the United States Navy in or connected with operations against an armed enemy of the United States. Defendants are informed and believe and upon such information and belief allege that the costs of construction of said complete naval vessels under said prime contract and said subcontracts were charged to and paid from Congressional appropriations of public funds of the United State appropriated and designated for expenditure by the Secretary of the Navy in furtherance of the Navy Department's emergency naval vessel construction and building program. Defendants are informed

and believe and upon such information and belief allege that the complete naval vessels constructed under said prime contract and under each of said subcontracts were, upon completion and before acceptance by the United States of America, inspected and tested by a Trial Board appointed under the authority of the Secretary of the Navy.

VII.

Admit the allegations contained in Paragraph VII of the alleged first cause of action of plaintiff's complaint.

VIII.

Admit the allegations contained in Paragraph VIII of the alleged first cause of action of plaintiff's complaint.

IX.

Admit the allegations contained in Paragraph IX of the alleged first cause of action of plaintiff's complaint.

X.

Defendants deny generally and specifically, each and every, all and singular, the allegations contained in Paragraph X of the alleged first cause of action of plaintiff's complaint and in that connection defendants allege that by virtue of Article 43 of the "Terms and Conditions" of said subcontract VS-14, the terms, covenants and conditions of said Prime Contract No. MCc-15762 were incorporated in and made part and parcel of said subcontract VS-14.

XI.

Defendants deny generally and specifically, each and every, all and singular, the allegations contained in Paragraph XI of the alleged first cause of action of plaintiff's complaint except that defendants admit that Special Provision No. 4, as set forth in said subcontract VS-14, contains a provision substantially as alleged in said Paragraph XI.

XII.

Defendants deny generally and specifically, each and every, all and singular, the allegations contained in Paragraph XII of the alleged first cause of action of plaintiff's complaint except that defendants admit that work to be performed by John Urquhart Birnie doing business as Birnie Electric Company under said subcontract VS-14 and the Addenda thereto was completed on or before March 26, 1946. Further answering the allegations contained in said Paragraph XII, defendants allege that the "Stated Contract Price" was the sum of \$432,688.50. Further answering the allegations contained in said Paragraph XII, defendants allege that they, or either of them, do not have sufficient information or belief to enable them to answer plaintiff's allegations respecting the alleged determination of amount by the United States Maritime Commission and basing their denial upon such lack of information and belief deny that at any time, or at all, the United States Maritime Commission or anyone on its behalf made any determination of any nature, or character whatever.

under said Special Provision No. 4, or under any other term, provision, condition or covenant of said subcontract VS-14 or otherwise, and in that connection defendants allege that if said determination was made as alleged in said Paragraph XII, that such was done without right, authority or justification in law and is now and at all times was void and of no force or effect whatever.

XIII.

Defendants deny generally and specifically, each and every, all and singular, the allegations contained in Paragraph XIII of the alleged first cause of action of plaintiff's complaint except that defendants admit that plaintiff paid the sum of \$389,-419.56 to John Urquhart Birnie doing business as Birnie Electric Company under and in partial performance of plaintiff's obligations of said subcontract VS-14, and there is now due, owing and unpaid from plaintiff to John Urquhart Birnie doing business as Birnie Electric Company the sum of \$43,268.94, thereunder.

XIV.

Admit the allegations contained in Paragraph XIV of the alleged first cause of action of plaintiff's complaint except that defendants deny that there is now or ever was due or owing or unpaid from either or both of these answering defendants to plaintiff, pursuant to said subcontract VS-14, or any or all of the Addenda thereto, or on any other basis whatever, the sum of \$148,946.57, or

any part thereof, or any other sum at all and defendants allege that there is now due, owing and unpaid from plaintiff to John Urquhart Birnie doing business as Birnie Electric Company the sum of \$43,268.94, under said subcontract and its Addenda as alleged in Paragraph XIII, above.

Answering the Allegations Contained in the Alleged Second and Separate Cause of Action of Plaintiff's Complaint, These Answering Defendants Admit, Deny and Allege

I.

Defendants repeat, reallege and incorporate herein the same as though specifically set forth all of their admissions, denials and allegations contained in Paragraphs I to XIV, inclusive, of their foregoing answer to the alleged first cause of action of plaintiff's complaint.

II.

Defendants admit the allegations contained in Paragraph II of the alleged second cause of action of plaintiff's complaint except that defendants, and each of them, deny that Performance Bond No C-28504 referred to in said Paragraph II or any other bond was made or executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States, or to any other person, firm or corporation, for the faithful performance, or for any purpose or performance whatever, by John Urquhart Birnie doing business as Birnie

Electric Company, or by any other person, of or in connection with Special Provision No. 4, or any of its subdivisions all as contained and set forth in said subcontract VS-14, (Exhibit "A" to plaintiff's complaint). Defendants and each of them, further deny that said bond was or is by its terms, or otherwise, binding upon or against the principal or the surety, named therein, jointly or severally, or otherwise, or that it has been or is, at all, or at any time, in full or any, force or effect in respect to said Special Provision No. 4, or any of the subdivisions thereof.

III.

Defendants admit the allegations contained in Paragraph III of the alleged second cause of action of plaintiff's complaint except that defendants, and each of them, deny that Performance Bond No. C-28589 referred to in said Paragraph III or any other bond was made or executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States, or to any other person, firm or corporation, for the faithful performance, or for any performance whatever, by John Urquhart Birnie doing business as Birnie Electric Company, or by any other person, of or in connection with Special Provision No. 4 or any of its subdivisions all as contained and set forth in said subcontract VS-14. Defendants and each of them, further deny that said bond was or is by its terms, or otherwise, binding upon or against the principal or the surety, named therein, jointly or severally,

or otherwise, or that it has been or is, at all, or at any time in full or any force or effect in respect to said Special Provision No. 4, or any of the subdivisions thereof.

IV.

Defendants admit the allegations contained in Paragraph IV of the alleged second cause of action of plaintiff's complaint except that the defendants, and each of them deny that the endorsement to the Bonds Nos. C-28504 and C-28589 referred to in said Paragraph IV or any other endorsement to said Bonds were made, executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States, or to any other person, firm or corporation, for the faithful performance, or for any performance whatever, by John Urquhart Birnie doing business as Birnie Electric Company or by any other person, of or in connection with Special Provision No. 4 or any of its subdivisions as contained and set forth in said subcontract VS-14. Defendants and each of them, further deny that said endorsement to said bonds was or is by its terms or otherwise, binding upon or against the principal or the surety, named therein, jointly or severally, or otherwise, or that it has been or is, at all, or at any time in full or any force or effect in respect to said Special Provision No. 4 or any of the subdivisions thereof.

V.

Defendants admit the allegations contained in Paragraph V in the alleged second cause of action

of plaintiff's complaint except that the defendants, and each of them deny that an unnumbered Performance Bond, dated November 9, 1944, referred to in said Paragraph V or any other bond was made or executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States or to any other person, firm or corporation, for the faithful performance, or for any performance whatever, by John Urquhart Birnie doing business as Birnie Electric Company, or by any other person, of or in connection with Special Provision No. 4 or any of its subdivisions all as set forth and contained in said subcontract VS-14 or any or all modifications or extensions thereof. Defendants and each of them, further deny that said bond was or is by its terms, or otherwise, binding upon or against the principal or the surety, named therein, jointly or severally, or otherwise, or that it has been or is, at all, or at any time in full or any force or effect in respect to said Special Provision No. 4 or any of the subdivisions thereof.

Answering the Allegations Contained in the Alleged Third and Separate Cause of Action of Plaintiff's Complaint, These Answering Defendants Admit, Deny and Allege

I.

Defendants repeat, reallege and incorporate herein the same as though specifically set forth all of their admissions, denials and allegations contained in Paragraphs I, II, IV, VI and XIII of their fore-

going answer to the alleged first cause of action of plaintiff's complaint.

II.

Defendant John Urquhart Birnie doing business as Birnie Electric Company for himself and not for any other defendant in this action, admits the allegations contained in Paragraph II of the alleged third cause of action of plaintiff's complaint and in that connection alleges that the indebtedness therein referred to arose out of, represents, is in connection with, and is based upon the performance of subcontracts VS-14 and VS-28 and their respective Addenda.

III.

Defendant John Urquhart Birnie doing business as Birnie Electric Company for himself and not for any other defendant in this action, admits the allegations contained in Paragraph III of the alleged third cause of action of plaintiff's complaint except that said defendant denies, for the reason and on the basis of the matters and things set forth in Paragraph III of defendants' fourth distinct separate and affirmative defense herein, that the sum of \$1,546.66, or any part thereof or any sum at all is due or owing or unpaid to plaintiff.

As and for a First Distinct, Separate and Affirmative Defense to Plaintiff's Complaint These Answering Defendants Allege:

I.

The inclusion of Special Provision No. 4 and all of its subdivisions in subcontract VS-14 referred to

in Paragraph VI of the alleged first cause of action of plaintiff's complaint was the result of an excusable mistake of fact on the part of both the plaintiff and defendant John Urquhart Birnie doing business as Birnie Electric Company. As to said Special Provision No. 4 and all of its subdivisions, there was a complete and total lack of meeting of minds between plaintiff and defendant John Urquhart Birnie doing business as Birnie Electric Company and a complete and total lack of consent by said defendant at the time said subcontract was made, executed and delivered as consent to a contract is defined and provided in and by Chapter III, Title I, Part II of the Civil Code of the State of California. It was not the intention of the parties thereto and particularly of said defendant, that said subcontract VS-14 should contain any provision providing for or in respect to the accounting for or payment to the plaintiff of any profits derived under said subcontract.

II.

At the time of execution and delivery of said subcontract VS-14 and prior to signature by said defendant, plaintiff through its authorized agent and attorney, who was then acting within the course of his employment and the scope of his authority, represented to said defendant that the terms of said subcontract VS-14 was in full compliance with and were required by existing law, prime contract MCo-15762 (under which said subcontract was written) and all regulations. Said defendant believed such representations which in truth and in fact

plaintiff then knew to be, and they were then, false and untrue with respect to Special Provision No. 4 and all of its subdivisions. Said defendant relied upon such false representations and signed and delivered said subcontract VS-14 to plaintiff, whereas said defendant would not have done so but for said false representations.

III.

The alleged first cause of action of plaintiff's complaint does not state facts sufficient to constitute a cause of action against either of these answering defendants.

As and for a Second Distinct, Separate and Affirmative Defense to Plaintiff's Complaint These Answering Defendants Allege:

I.

That all of the performance bonds and the endorsement thereto and thereon referred to in Paragraphs II, III, IV and V of the alleged second cause of action in plaintiff's complaint were made, executed and delivered to plaintiff in favor of plaintiff, United States of America, and the United States Maritime Commission, as their interests might appear, for the faithful performance by the principal named therein, to wit, John Urquhart Birnie doing business as Birnie Electric Company, of his obligations under subcontract VS-14 and the respective Addenda thereto, (true copies of said last mentioned documents appear as Exhibits "A," "B," "C" and "D" to plaintiff's complaint); saving and excepting however that it was not the purpose of

intention of any of the parties to said bonds and the endorsement thereto and thereon, nor was it the purpose or intention of any of the persons in whose favor said bonds and said endorsement thereon were made, to secure or answer for the alleged and purported, though non-existent, obligation of defendant, John Urquhart Birnie doing business as Birnie Electric Company, under Special Provision No. 4 and the subdivisions thereof, all as set forth in said subcontract VS-14.

II.

The alleged second cause of action of plaintiff's complaint does not state facts sufficient to constitute a cause of action against either of these answering defendants.

As and for a Third Distinct, Separate and Affirmative Defense to Plaintiff's Complaint These Answering Defendants Allege:

I.

Defendants replead, reallege and re-incorporate herein the same as though specifically set forth all of the affirmative allegations contained in Paragraph VI of their foregoing answer to plaintiff's alleged first cause of action.

II.

On July 19, 1946, defendant John Urquhart Birnie doing business as Birnie Electric Company, as plaintiff, filed an action for a declaratory judgment, naming the plaintiff herein as defendant in said action, in the United States District Court, Southern

District of California, Central Division (being action number 5581-PH), wherein and whereby said plaintiff in said action alleged and set forth all of the material matters and things alleged and claimed by plaintiff herein in its alleged first cause of action and in addition thereto said defendant, as plaintiff in said action in said Southern District of California, set forth the making, execution and delivery and performance of said subcontract VS-28 and its Addendum. The issues tendered and the prayer for relief in said action in said Southern District of California seek and pray for a declaration of the rights and obligations of the plaintiff herein and said defendant under both of said subcontracts and their respective Addenda and further, a declaration that plaintiff in said action is not bound or obligated to pay or account to the defendant therein for any profits of any character under said subcontracts VS-14 or VS-28 or their respective Addenda, and the further declaration of the amount owing by the defendant therein to the plaintiff therein on account of performance under said subcontracts and their respective Addenda.

III.

Said suit in said Southern District of California was filed prior in time, to wit, on July 19, 1946, to the filing of this action on July 20, 1946, and service of process upon the defendant in said other action was had and obtained prior in time to the service of process upon the defendants in this action. More complete, speedier and more adequate relief

can and will be afforded all parties upon the whole controversy in and by virtue of the said other action.

As and for a Fourth Distinct, Separate and Affirmative Defense to Plaintiff's Complaint These Answering Defendants Allege:

I.

On or about November 28, 1944, defendant, John Urquhart Birnie doing business as Birnie Electric Company, and plaintiff executed and entered into a written subcontract VS-28 and thereafter, on or about April 5, 1945, executed and entered into a written Addendum No. 1 to said subcontract VS-28. True copies of said written subcontract and written Addendum thereto are hereto attached, marked Exhibit "A," and by reference hereby made a part hereof as though fully set forth herein. Said written subcontract VS-28 and its Addendum thereto, Exhibit "A," were signed, executed and delivered by the parties thereto within the State of California. Oscar A. Mellin, who signed and executed said subcontract of November 28, 1944, for and on behalf of said defendant, was at the time of the execution thereof the duly appointed and authorized attorney in fact of said defendant.

II.

Defendants allege that said Addendum No. 1 purports on its face to be executed under and in connection with Prime Contract No. MCo-36452, whereas, in truth and in fact said Addendum No. 1 was executed under and in connection with Prime

Contract No. MCc-15762 and was so intended by the parties to said Addendum and said reference therein to Prime Contract MCc-36452 was an inadvertence, misconception and mistake of fact on the part of both parties thereto when executing said Addendum No. 1 to said subcontract VS-28.

III.

Defendant, John Urquhart Birnie doing business as Birnie Electric Company, has fully performed all of the terms, covenants and conditions and has furnished all of the materials required of him by subcontract VS-14 and its Addenda referred to in plaintiff's alleged first cause of action and required of him by said subcontract VS-28 and its Addendum and has in all respects performed his duty thereunder.

IV.

The stated contract price of subcontract VS-14 and its Addenda (attached as Exhibits "A," "B," "C" and "D" to plaintiff's complaint) was and is the sum of \$432,688.50, of which sum plaintiff has paid to said defendant the sum of \$389,419.56. The stated contract price of subcontract VS-28 and its Addendum (attached hereto as Exhibit "A") was and is the sum of \$153,327.35, of which sum plaintiff has paid to said defendant the sum of \$83,218.50; and there is due, owing and unpaid from plaintiff to defendant, John Urquhart Birnie doing business as Birnie Electric Company, under both of said subcontracts VS-14 and VS-28 and

their respective Addenda, the total sum of \$113,377.79.

As and for a Fifth Distinct, Separate and Affirmative Defense to Plaintiff's Complaint These Answering Defendants Allege:

I.

Defendants replead, reallege and re-incorporate herein the same as though specifically set forth, all of the affirmative allegations contained in Paragraph VI of their foregoing answer to plaintiff's alleged first cause of action.

II.

Said subcontracts VS-14 and VS-28 and their respective Addenda and Prime Contract No. MCc-15762 between plaintiff and the United States Maritime Commission under which said subcontracts were let, covered and provided for the construction of complete naval vessels and portions thereof and said subcontracts and their respective Addenda were entered into in a taxable year to which the excess profits tax provided in Subchapter E of Chapter 2 of the United States Internal Revenue Code was and is applicable and would be applicable if said defendant, as subcontractor, were a corporation and in that connection defendants allege that Section 496 (a), Title 34, U.S.C., is applicable to said subcontracts and their respective Addenda.

Wherefore, defendants pray:

(1) That plaintiff take nothing by virtue of its complaint herein.

(2) That defendant, John Urquhart Birnie doing business as Birnie Electric Company, have judgment against plaintiff in the sum of \$111,832.13, which said last mentioned sum is computed by deducting plaintiff's demand under its alleged third cause of action from the total sum due to said defendant under said defendant's fifth separate, distinct and affirmative defense herein.

(3) That this action and all further steps and proceedings therein be stayed, suspended and abated pending final disposition of action number 5581-PH now pending in the United States District Court, Southern District of California, Central Division.

(4) That defendants be given judgment for their costs herein expended and such other and further relief as to the Court may seem just and proper.

DANA MURDOCK,
CHARLES P. McCARTHY,
WILLIAM S. SCULLY,
HILL, MORGAN & FARRER,
TINNING & DeLAP,

By /s/ WILLIAM S. SCULLY,
Attorneys for Answering
Defendants.

Exhibit A

Subcontract

The Permanente Metals Corporation

Kaiser Company, Inc.

Kaiser Cargo, Inc.

(Shipyard Number Two)

Post Office Box 1072, Richmond, California

United States Maritime Commission

Contract Nos. MCe-15762

Vessels—Subcontract No. VS-28

Date: November 28, 1944

Requisition No.

The Permanente Metals Corporation, hereinafter referred to as Contractor, and Birnie Electric Company, with offices located at 816 West 5th Street, Los Angeles, California, hereinafter referred to as Subcontractor, hereby agree that the following work shall be performed for the compensation and upon the terms and conditions hereinafter set forth on the face of this Subcontract, and including Articles 1 through 47 of the Terms and Conditions attached to and made a part of this Subcontract:

Work to Be Performed:

See Appendix "A"

Plans, Drawings and/or Specifications:

See Appendix "A"

Location of Work: All installation work shall be performed at the Contractor's Shipyard No. 2, Richmond, California. However, Subcontractor may do certain fabricating at its own plant.

Items to Be Supplied by Contractor:

See Appendix "A"

Work to Commence: Subcontractor shall commence the aforesaid work as directed by Contractor.

Work to Be Completed: (Time is of the essence of this Subcontract) Subcontractor shall so staff and plan his work and shall work as many hours per day and as many days per week to keep abreast of the Contractor's schedule; all without additional compensation thereof.

Compensation: Subcontractor shall be compensated for the performance of aforesaid work in accordance with the following:

Item 1—Degaussing\$8,500.00 per vessel

Item 2—Voice Tube and Whistle 1,200.00 per vessel

Item 3—Mechanical Telegraph 4,000.00 per vessel

Bonds: Required (See Article 23).

Liquidated Damages: None specified.

Special Provisions:

See Appendix "A"

This Subcontract is subject to the approval of the United States Maritime Commission.

THE PERMANENTE METALS CORP.,
Contractor.

By /s/ T. A. BEDFORD,
Assistant General Manager.

Approved as to Form:

By /s/ R. K. FRISBIE,
Contractor's Legal Department.

BIRNIE ELECTRIC COMPANY,
Subcontractor.

By /s/ JOHN U. BIRNIE,
Sole Proprietor.

By /s/ OSCAR A. MELLIN,
His Attorney-in-Fact.

Approved 1/17/45:

UNITED STATES MARITIME
COMMISSION.

By /s/ C. V. FISHER,
Material Controller.

Terms and Conditions

Revision No. 2 5-43.

[See Terms and Conditions (Revision No. 2 5-43 set out on pages 22 to 38 of this printed record.)]

Appendix "A"

Work to Be Performed:

Subcontractor shall install the following items on twelve (12) AP-2 Design Vessels, hulls numbered 574 to 580, inclusive, and 597 to 601, inclusive, under Prime Contract No. MCc-15762.

1. Degaussing

Subcontractor shall furnish all supervision, labor, equipment and materials except such as may be furnished by the United States Navy, necessary to completely fabricate and install the Degaussing System including degaussing troughs, covers, straps, cables, kick pipes, bulkhead penetrations, junction boxes, control panels, and any other fixtures, parts, or wiring necessary to completely install and operate the system to the satisfaction of the United States Maritime Commission, United States Navy, and the Contractor. Certificate of acceptance by the United States Navy shall be required on each vessel.

2. Voice Tube & Whistle

Subcontractor shall furnish all supervision, labor, equipment, and materials except such as may be furnished by the Contractor or the United States Navy, to completely make all straps and hangers required throughout the Voice Tube & Whistle System, and shall mount all equipment that may be required to complete the installation.

3. Mechanical Telegraph

Subcontractor shall furnish all supervision, labor, equipment and material except such as may be furnished by the United States Maritime Commission, United States Navy or the Contractor necessary to completely make and install all straps and hangers required throughout the Mechanical Telegraph System, and mount all equipment as may be required to complete the system to the satisfaction of the United States Maritime Commission, the United

Plans, Drawings and/or Specifications:

Subcontractor shall perform said work in accordance with Plans, Drawings and/or Specifications on file with The Permanente Metals Corporation, Office of the Naval Architect. All changes to said plans, drawings and/or specifications prior to installation and all minor changes shall be made by the Subcontractor at no additional cost to the Contractor.

Items To Be Supplied by Contractor:

Contractor shall furnish light, power, water, air and crane service; also space for storage of materials required for the work aforesaid and shop space; and such transportation as may be necessary to haul wire reels and heavy parts of equipment within the aforesaid shipyard.

Contractor shall furnish all raw materials required for the Voice Tube & Whistle and Mechanical Telegraph Systems; fabrication of the raw materials furnished shall be the responsibility of the Subcontractor.

Special Provisions:

1. The Subcontractor shall not be allowed any increase in price from any cause except a major change in designs.

2. Article 17 shall be modified as follows:

(a) By striking the last sentence of Paragraph A.

(b) By inserting in the last sentence of Paragraph B (2), between the words "costs" and "shall," the following: "shall exclude any charge for interest on borrowings, and."

(c) Strike in the last sentence of Paragraph

C, the words "with appropriate adjustment to cover costs of delivery," and insert therefor, "Appropriate adjustment will be made for delivery costs or savings therein."

3. Article 32 shall be modified as follows:

(a) By striking Paragraph A and inserting therefor, "If this subcontract be for maintenance or for vessel construction, and hence covered by Contractor's vessel contract, in the performance of the work hereunder, Subcontractor shall pay the wage rates and observe the other working conditions for like work established by the Contractor in the shipyard and approved by the United States Maritime Commission.

4. Article 45 shall be modified to read as follows:

"Contractor and Subcontractor agree that the work to be performed pursuant to this Subcontract shall be performed at the prices stated on the face of this Subcontract or the maximum ceiling prices under applicable regulations of the Office of Price Administration, whichever are the lower. Subcontractor nevertheless represents, warrants, and certifies that none of the prices, after taking into consideration all factors affecting the final Subcontract price contained in the Subcontract, exceed the maximum prices chargeable and payable under the regulations of the Office of Price Administration and/or any other applicable State or Federal legislation or regulations.

5. Contractor shall pay Subcontractor by monthly payments; said payments shall be based

upon 90% of the sum due on progress estimates made by the Subcontractor and approved by the Contractor. Contractor shall withhold ten per cent (10%) of such sums pending final determination of profits under this subcontract, as hereinafter provided.

6. Outstanding amounts, if any, due at the completion of this subcontract are payable fifteen (15) days after final determination of such amounts as provided in this subcontract.

7. Report of Cost—Excess Profits: The Subcontractor agrees to account for and pay to the Contractor certain profits derived under this contract and for such purposes agrees:

(a) To make a report under oath to the Commission care of the Contractor upon completion of this contract, setting forth in the form prescribed by the Commission the total contract price, the total cost of performing the contract, the amount of Subcontractor's overhead charged to such cost, the net profits and the percentage such net profit bears to the contract price, and such other information as the Commission shall prescribe;

(b) To pay to the Contractor profit as shall be determined by the Commission in excess of ten (10) per cent of the total contract price which amount shall become the sole property of the Commission.

(c) To make no subdivisions of any contract or subcontract for the same article or articles for the purpose of evading the provisions of this Article; and any subdivision of

any contract or subcontract involving an amount in excess of \$10,000 shall be subject to the conditions prescribed in this article; provided that agreements for the purchase of material and/or for the rental of equipment shall not be considered as subdivisions of any contract or subcontract within the meaning of this section;

(d) That the books, files and all other records of the Subcontractor or any holding, subsidiary, affiliated, or associated company, shall at all times be subject to inspection and audit by any person designated by the Contractor or the Commission, and the premises shall at all times be subject to inspection by the agents of the Commission and Contractor.

It is further understood and agreed that the Commission shall prescribe the method of determining the Subcontractor's profits: Provided, that, in computing such profits no salary of more than \$25,000 per year to any individual shall be considered as a part of the cost and no cost will be allowed which, in the judgment of the Commission, is not fair and just or is in excess of a reasonable market price for commodities or goods or services purchased or charged.

Although the accounting for profits and payments to be made under the provisions of this Article shall be in accordance with the provisions of Section 505 (b) of the Merchant Marine Act, 1936, as amended and the regulations of the Commission issued pursuant thereto, the losses incurred in connection with the performance of this contract shall not be used in connection with computing profits

derived under any other contracts that the Subcontractor may have with the Contractor or Commission and losses incurred in connection with such other contracts shall not be used in connection with computing profits derived under this contract, it being understood and agreed that the obligation of the Subcontractor to make payments under this Article is contractual and that such payments shall in effect constitute a reduction of the amount of the contract price which the Contractor is entitled to retain.

Addendum No. 1 to Subcontract No. VS-28

MCc-36452

This Addendum made and entered into this 5th day of April, 1945, by and between The Permanente Metals Corporation, Shipbuilding Division, Richmond, California, hereinafter called the Contractor, and Birnie Electric Company, with offices located at 816 West 5th Street, Los Angeles, California, hereinafter called Subcontractor,

Witnesseth:

Whereas, the parties herein have heretofore entered into Subcontract No. VS-28 whereby Subcontractor agreed to install the degaussing, voice tube and whistle and the mechanical telegraph systems on twelve (12) AP-2 Design Vessels, hulls numbered 574 to 580, inclusive, and 597 to 601, inclusive, under Prime Contract No. MCc-36452; and

Whereas, on hull numbered 597 the Subcontractor furnished the material, layout work and supervision

for the degaussing system only, inasmuch as said hull was transferred from Yard Number Two to Yard Number One for outfitting; and

Whereas, prior to the transfer of hull numbered 597 the Subcontractor completed only 30.91 per cent of the degaussing, listed as Item 1 under the "Work to be Performed" provision of Subcontract No. VS-28;

Now, Therefore, It Is Agreed by and Between the Parties Hereto:

1. Contractor shall pay Subcontractor the sum of \$2,627.35 for the work performed on the degaussing system on hull numbered 597.

2. Except as herein otherwise provided the terms and conditions of Subcontract No. VS-28 shall be unchanged and in full force and effect.

THE PERMANENTE METALS
CORPORATION,

Contractor.

By /s/ W. F. GEYER,

Administrative Engineer.

Approved as to Form:

By /s/ ROGER SAMS,

Contractor's Legal
Department.

BIRNIE ELECTRIC
COMPANY,

Subcontractor.

By /s/ JOHN URQUHART BIRNIE,
Owner.

State of California,
County of Los Angeles—ss.

John Urquhart Birnie being first duly sworn, deposes and says: that he is one of the defendants in the above-entitled action; that he has read the foregoing Answer of John Urquhart Birnie and Massachusetts Bonding and Insurance Company, a Corporation, and knows the contents thereto; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true; and that he verifies this Answer on behalf of himself and Massachusetts Bonding and Insurance Company.

/s/ JOHN URQUHART BIRNIE.

Subscribed and sworn to before me this 28th day of August, 1946.

[Seal] /s/ EDITH E. PELLEGRIN,
Notary Public in and for the County of Los Angeles,
State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 29, 1946.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT FOR PAYMENT OF MONEY DUE AND AGAINST PRINCIPAL AND SURETY UPON CONTRACT PERFORMANCE BOND

Plaintiff complains of defendants above named, and for a First Cause of Action alleges that:

I.

At all times herein mentioned, plaintiff was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and duly qualified and doing business in the State of California, with its principal place of business in the Northern District of California.

II.

At all times herein mentioned, defendant, John Urquhart Birnie, also sometimes known and referred to as John U. Birnie, was, and now is, a resident of the State of California, and was, and is, doing business in the Northern District of California and elsewhere as Birnie Electric Company.

III.

At all times herein mentioned, defendant, Massachusetts Bonding and Insurance Company, a corporation, was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, and duly qualified and

doing business in the State of California, and particularly in the Northern District of California.

IV.

First Doe, Second Doe, Third Doe, First Doe Company, Second Doe Company and Third Doe Company are the fictitious names of defendants whose true names are unknown to plaintiff, and plaintiff asks that when such true names are discovered, that this First Amended Complaint may be amended by inserting such true names in the place and stead of such fictitious names, together with appropriate charging allegations.

V.

The amount involved in this litigation exceeds, exclusive of interest and costs, the sum of \$3,000.00.

VI.

On or about May 29, 1944, in Contra Costa County, California, in the Northern District of California, plaintiff and defendant, John Urquhart Birnie, doing business as Birnie Electric Company, made and entered into a certain contract in writing, bearing date of May 29, 1944, designated Vessels Subcontract No. VS-14, under United States Maritime Commission Contract No. MCc-15762. Said contract was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about August 3, 1944, in Contra Costa County, California, in said Northern District

of California. A true copy of said contract is attached to the Complaint on file herein as Exhibit A thereto and is hereby referred to and incorporated herein by reference as though fully set forth herein.

VII.

On or about August 10, 1944, plaintiff and said defendant duly executed an Addendum to said contract designated as Addendum No. 1 to Subcontract No. VS-14. Said Addendum No. 1 was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about September 19, 1944. A true copy of said Addendum No. 1 is attached to the Complaint on file herein as Exhibit B thereto and is hereby referred to and incorporated herein by reference as though fully set forth herein.

VIII.

On or about October 19, 1944, plaintiff and said defendant duly executed an Addendum to said contract designated as Addendum No. 2 to Subcontract No. VS-14. Said Addendum No. 2 was subject to the approval of the United States Maritime Commission, and was duly approved in writing by the United States Maritime Commission on or about October 28, 1944. A true copy of said Addendum No. 2 is attached to the Complaint on file herein as Exhibit C thereto and is hereby referred to and incorporated herein by reference as though fully set forth herein.

IX.

On or about November 20, 1944, plaintiff and said defendant duly executed an Addendum to said contract, designated as Addendum No. 3 to Subcontract No. VS-14. Said Addendum No. 3 was subject to the approval of the United States Maritime Commission and was duly approved in writing by the United States Maritime Commission on or about February 27, 1945. A true copy of said Addendum No. 3 is attached to the Complaint on file herein as Exhibit D thereto and is hereby referred to and incorporated herein by reference, as though fully set forth herein.

X.

Plaintiff has fully and faithfully done and performed all acts and things on its part to be done or performed under said contract and the said Addenda thereto.

XI.

Said contract contained a Special Provision No. 4, to which reference is hereby made, whereby said defendant agreed to account for and pay to plaintiff profits realized by said defendant in the performance of the contract as determined by the United States Maritime Commission to be in excess of 10% of the total contract price, such amount so paid to become the sole property of the United States Maritime Commission.

XII.

After said defendant had completed the work to be performed by said defendant under said con-

tract and the Addenda thereto, and on February 25, 1947, the United States Maritime Commission duly and regularly determined, by action of the United States Maritime Commission at Washington, D. C., that the amount of such excess profits under Special Provision No. 4, which said defendant agreed to pay to plaintiff to become the sole property of the United States Maritime Commission, as aforesaid, was the sum of \$190,490.96, computed as follows:

Stated Contract Price.....	\$430,963.95
Cost of Performance.....	197,376.57
Allowable Profit	43,096.40
	<hr/>
	\$240,472.99
Recapturable Profits	\$190,490.96

Said determination provided that the Secretary of the United States Maritime Commission should notify said defendant of the action of the United States Maritime Commission in making said determination with respect to the excess profits realized under said Subcontract VS-14 and that unless said defendant, within thirty days from the date of notice of such action, should request a hearing with respect to such determination by the United States Maritime Commission, such determination should become final. Pursuant to such provision of said determination, the secretary of the United States Maritime Commission, on or about February 25, 1947, duly notified said defendant of the said action of the United States Maritime Commission, and thereafter and prior to the date of the filing of this First Amended Complaint said defendant duly

waived the right to request a hearing with respect to such determination, and said determination has now become final.

XIII.

Plaintiff paid to said defendant prior to such determination by the United States Maritime Commission of the amount of excess profits, as aforesaid, the total sum of \$389,419.56, which total sum was \$148,946.57 in excess of said final contract price of \$240,472.99 as determined by the United States Maritime Commission, as aforesaid.

XIV.

Since said determination by the United States Maritime Commission became final as aforesaid, plaintiff has made a demand upon said defendant for the payment to plaintiff of said sum of \$148,946.57, but said defendant has failed and refused, and still fails and refuses, to pay said sum, or any part thereof, to plaintiff, and there is now due, owing and unpaid from said defendant to plaintiff, pursuant to said Contract No. VS-14 and the Addenda thereto, the sum of \$148,946.57.

Wherefore, plaintiff prays judgment against said defendant as hereinafter requested.

For a Second and Separate Cause of Action, plaintiff alleges that:

I.

Plaintiff repleads all of the allegations contained in Paragraphs I to XIV, inclusive, of plaintiff's First Cause of Action, to which reference is hereby

made, and the same are hereby incorporated and referred to in this Second Cause of Action and made a part hereof as though the same were fully set forth herein.

II.

On or about July 31, 1944, defendant, John Urquhart Birnie, doing business as Birnie Electric Company, as principal, and defendant, Massachusetts Bonding and Insurance Company, as surety, for a valuable consideration, made, executed and delivered to plaintiff a certain Performance Bond No. C-28504, in favor of "The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear," in the sum of \$44,048.45 to secure the faithful performance by defendant John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract No. VS-14, and all modifications and extensions thereof. Said Performance Bond was, and is, by its terms binding upon said principal and surety, jointly and severally, and has been at all times since said date, and now is, in full force and effect. A true copy of said Performance Bond is attached to the Complaint on file herein as Exhibit E and is hereby incorporated herein by reference as though fully set forth herein.

III.

On or about August 28, 1944, defendant, John Urquhart Birnie, doing business as Birnie Electric Company, as principal, and defendant, Massachusetts Bonding and Insurance Company, as

surety, for a valuable consideration, made, executed and delivered to plaintiff a certain Performance Bond, No. C-28589, in favor of "The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear," in the sum of \$150,754.22, to further secure the faithful performance by defendant, John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract No. VS-14 and Addendum No. 1 thereto, and all modifications and extensions thereof. Said Performance Bond was, and is, by its terms binding upon said principal and surety, jointly and severally, and has been at all times since said date, and now is, in full force and effect. A true copy of said Performance Bond is attached to the Complaint on file herein as Exhibit F and is hereby incorporated herein by reference as though fully set forth herein.

IV.

On or about October 31, 1944, defendant, Massachusetts Bonding and Insurance Company, for a valuable consideration, made, executed and delivered to plaintiff an Endorsement to be attached to and form a part of said Performance Bond No. C-28504 and said Performance Bond No. C-28589, whereby the coverage of each of said Performance Bonds was, and is, increased by \$25,000.00 to further secure the faithful performance by defendant, John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract VS-14 and the Addenda thereto. Said Endorsement has been at

all times since said date, and now is, in full force and effect. A true copy of said Endorsement is attached to the Complaint on file herein as Exhibit G thereto and is hereby incorporated herein as though fully set forth herein.

V.

On or about November 9, 1944, defendant, John Urquhart Birnie, doing business as Birnie Electric Company, as principal, and defendant, Massachusetts Bonding and Insurance Company, as surety, for a valuable consideration, made, executed and delivered to plaintiff a certain unnumbered Performance Bond in favor of "The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear," in the sum of \$87,566.38, to secure the faithful performance by defendant, John Urquhart Birnie, doing business as Birnie Electric Company, of said Contract No. VS-14, and all modifications and extensions thereof. Said Performance Bond was, and is, by its terms binding upon said principal and said surety, jointly and severally, and has been at all times since said date, and now is, in full force and effect. A true copy of said Performance Bond is attached to the Complaint on file herein as Exhibit H thereof and is hereby incorporated herein by reference as though fully set forth herein.

Wherefore, plaintiff prays judgment against said defendants as hereinafter requested.

For a Third and Separate Cause of Action, plaintiff alleges that:

I.

Plaintiff repleads all of the allegations contained in Paragraphs I, II and IV of plaintiff's First Cause of Action, to which reference is hereby made, and the same are hereby incorporated and referred to in this Third Cause of Action and made a part hereof as though the same were fully set forth herein.

II.

Within two years last past, defendant, John Urquhart Birnie, doing business as Birnie Electric Company, became indebted to plaintiff in the sum of \$1,545.66 for the agreed and reasonable value of goods furnished and services rendered by plaintiff to said defendant at said defendant's special instance and request in the County of Contra Costa, in the Northern District of California.

III.

Plaintiff has made demands upon said defendant for the payment of said sum of \$1,545.66, but said defendant has failed and refused to pay the same to plaintiff, and the said sum is now due, owing and unpaid.

Wherefore, plaintiff prays judgment against said defendants as hereinafter requested.

1. Against defendant, John Urquhart Birnie, doing business as Birnie Electric Company, for the sum of \$148,946.57, mentioned in the First Cause

of Action, together with interest upon said sum until paid, as allowed by law.

2. Against defendant, John Urquhart Birnie, doing business as Birnie Electric Company, and defendant, Massachusetts Bonding and Insurance Company, jointly and severally, for the sum of \$148,946.57, mentioned in the said Second Cause of Action, together with interest upon said sum until paid, as allowed by law.

3. Against defendant, John Urquhart Birnie, doing business as Birnie Electric Company, for the sum of \$1,545.66, mentioned in said Third Cause of Action, together with interest upon said sum until paid, as allowed by law.

4. Against defendants for a reasonable sum to be fixed by the Court as and for attorneys' fees for Plaintiff, in accordance with Article 29 of said Contract No. VS-14.

5. For costs of suit, and for such other and further relief as may be proper.

/s/ BRUCE WALKUP,
/s/ WILLIS S. SLUSSER,
THELEN, MARRIN, JOHNSON
& BRIDGES,
Attorneys for Plaintiff.

[Endorsed]: Filed March 24, 1947.

In the United States District Court, Northern
District of California, Southern Division

No. 26215 S

THE PERMANENTE METALS CORPORA-
TION, a Corporation,

Plaintiff,

vs.

JOHN URQUHART BIRNIE, an Individual
Doing Business as BIRNIE ELECTRIC
COMPANY, MASSACHUSETTS BONDING
AND INSURANCE COMPANY, a Corpora-
tion, FIRST DOE, SECOND DOE, THIRD
DOE, FIRST DOE COMPANY, SECOND
DOE COMPANY, THIRD DOE COMPANY,

Defendants.

JOHN URQUHART BIRNIE, an Individual
Doing Business as BIRNIE ELECTRIC
COMPANY, and MASSACHUSETTS BOND-
ING AND INSURANCE COMPANY, a Cor-
poration,

Defendants and Cross-Complainants,

vs.

THE PERMANENTE METALS CORPORA-
TION, a Corporation, UNITED STATES
MARITIME COMMISSION, and JOSEPH
K. CARSON, RAYMOND S. McKEOUGH,
ADMIRAL WILLIAM W. SMITH, GRAN-

VILLE MELLON and RICHARD PARK-
HURST, as Members of UNITED STATES
MARITIME COMMISSION,

Plaintiff and Cross-Defendants.

ANSWER TO FIRST AMENDED COMPLAINT,
CROSS-COMPLAINT AND COUNTER-
CLAIM OF JOHN URQUHART BIRNIE
AND MASSACHUSETTS BONDING AND
INSURANCE COMPANY, a Corporation

Come now John Urquhart Birnie, an individual doing business as Birnie Electric Company and Massachusetts Bonding and Insurance Company, a corporation, and severing from all other defendants in this action and answering the first amended complaint of the plaintiff on file herein, and for answer to the alleged first cause of action of plaintiff's first amended complaint, admit, deny and allege:

I.

Defendants have no knowledge of the allegations contained in Paragraph I of the alleged first cause of action of plaintiff's first amended complaint.

II.

Answering Paragraph II of the complaint, defendants admit that the defendant John Urquhart Birnie, also sometimes known and referred to as John U. Birnie, was and at all times mentioned herein and now is a resident of Los Angeles, County of Los Angeles, State of California, and was, prior to the filing of the complaint herein, doing business

in the Northern District of California, and elsewhere, as Birnie Electric Company, but deny that at the time of filing the complaint or at any time subsequent thereto that he was doing business in the Northern District of California as Birnie Electric Company, or otherwise.

III.

Admit the allegations contained in Paragraph III of the alleged first cause of action of plaintiff's first amended complaint.

IV.

Defendants have no knowledge of the allegations contained in Paragraph IV of the alleged first cause of action of plaintiff's first amended complaint, and on that ground deny the same.

V.

Admit the allegations contained in Paragraph V of the alleged first cause of action of plaintiff's first amended complaint.

VI.

Admit the allegations contained in Paragraph VI of the alleged first cause of action of plaintiff's first amended complaint, and in that connection defendants allege that under Vessel Subcontract No. VS-14, by virtue of Article 43 of the "Terms and Conditions" thereof, all of the terms, covenants, and conditions of Prime Contract No. MCc-15762 between the United States Maritime Commission

and the plaintiff were adopted, incorporated, and made part and parcel of the terms, covenants, and conditions of said subcontract VS-14. Said subcontract VS-14 and said Prime Contract No. MCc-15762 were negotiated, made, executed and delivered as a part of and in connection with the emergency naval construction program, authorized by the laws of the United States, among which were and are the Act of March 27, 1934 (48 Stat. 503, 34 U.S.C.A. 496), and the Act of October 8, 1940 (54 Stat. 1003, 34 U.S.C.A. 496A). The said prime contract was a contract for the construction and manufacture of complete naval vessels. The said subcontract VS-14 was a contract for the construction and manufacture of a portion of said complete naval vessels, namely the installation of equipment in and upon said complete naval vessels as more particularly described in said subcontract and the addenda thereto. That at all times, the vessels covered by said prime contract and said subcontract were constructed for the United States Navy, and the same were upon completion, actually accepted, commissioned, used and employed as complete naval vessels by the United States Navy in or connected with operations against an armed enemy of the United States. That said subcontract VS-14 and its respective Addenda were entered into in a taxable year to which the excess profits tax provided in Subchapter E of Chapter 2 of the United States Internal Revenue Code was and is applicable and would be applicable if the defendant John Urquhart Birnie, doing business as Birnie Electric Company,

as sub-contractor, were a corporation, and in that connection defendants allege that the Act of March 27, 1934 (48 Stat. 503, 34 U.S.C.A. 496), and the Act of October 8, 1940 (54 Stat. 1002, 34 U.S.C.A. 496A), are applicable to said subcontract and its respective Addenda.

VII.

Admit the allegations contained in Paragraph VII of the alleged first cause of action of plaintiff's first amended complaint.

VIII.

Admit the allegations contained in Paragraph VIII of the alleged first cause of action of plaintiff's first amended complaint.

IX.

Admit the allegations contained in Paragraph IX of the alleged first cause of action of plaintiff's first amended complaint.

X.

Defendants deny generally and specifically, each and every, all and singular, the allegations contained in Paragraph X of the alleged first cause of action of plaintiff's first amended complaint.

XI.

Answering Paragraph XI of the alleged first cause of action of plaintiff's first amended complaint, defendants admit that said subcontract contains Special Provision No. 4 in the words and

figures as set out in said subcontract, to which reference is hereby made, but deny the implication of the allegations of Paragraph XI of the alleged first cause of action of plaintiff's first amended complaint that said Special Provision No. 4 is effective and is binding on defendant sub-contractor to account for and to pay to plaintiff profits realized by said defendant sub-contractor in the performance of the contract as determined by the United States Maritime Commission to be in excess of 10% of the total contract price, or in any other amount.

XII.

Answering Paragraph XII of the alleged first cause of action of plaintiff's first amended complaint, defendants deny, both generally and specifically, each and every, all and singular, the allegations contained therein, and allege that if said determination was made as alleged in said Paragraph XII, that such was done without right, authority or justification in law and is now and at all times was void and of no force and effect whatever.

XIII.

Defendants deny generally and specifically, each and every, all and singular, the allegations contained in Paragraph XIII of the alleged first cause of action of plaintiff's first amended complaint except that defendants admit that plaintiff paid the sum of \$389,419.56 to John Urquhart Birnie, doing business as Birnie Electric Company, under and in

partial performance of plaintiff's obligations of said subcontract VS-14.

XIV.

Defendants admit that plaintiff has made a demand upon said defendants for the payment to plaintiff of the sum of \$148,946.57, and admit that said defendants have failed and refused and still fail and refuse to pay said sum or any part thereof to plaintiff, but deny that there is now due, owing and unpaid from said defendants, or either of them, to plaintiff, pursuant to said subcontract VS-14 and the Addenda thereto, the sum of \$148,946.57, or any other sum, or at all.

XV.

Further answering the alleged first cause of action of plaintiff's first amended complaint, defendant John Urquhart Birnie, doing business as Birnie Electric Company, has fully performed all of the terms, covenants and conditions and has furnished all of the materials required of him by subcontract VS-14 and its Addenda referred to in plaintiff's alleged first cause of action in plaintiff's first amended complaint. The stated contract price of subcontract VS-14 and its Addenda (attached as Exhibits "A," "B," "C" and "D" to plaintiff's complaint) was and is the sum of \$432,604.83, of which sum plaintiff has paid to said defendant the sum of \$389,419.56; and there is due, owing and unpaid from plaintiff to defendant John Urquhart Birnie, doing business as Birnie Electric Company,

under said subcontract VS-14 and its Addenda, the total sum of \$43,185.27.

XVI.

Further answering the alleged first cause of action of plaintiff's first amended complaint, defendants allege that this Court is without jurisdiction in that said alleged first cause of action of plaintiff's first amended complaint fails to state a cause of action against these defendants, on the ground of non-joinder of an indispensable and necessary party, to wit, the United States Maritime Commission, in that said United States Maritime Commission has such an interest in the subject matter involved that any final decree rendered herein would materially affect the interest of the United States Maritime Commission for the following reasons:

(a) The United States Maritime Commission is the real party in interest herein as appears from the terms of the contract sued upon, set forth in Paragraphs VI and XI of the alleged first cause of action of plaintiff's first amended complaint, more particularly in this, that any amount paid as claimed by plaintiff is to become the sole property of the United States Maritime Commission; that as a result thereof, the United States Maritime Commission, representing the United States, has a direct interest in the outcome of this action and is, therefore, an indispensable and a necessary party.

(b) That defendants, John Urquhart Birnie and the Massachusetts Bonding & Insurance Company, are informed and believe and, basing their allegations upon such information and belief, allege that

the acts of plaintiff, The Permanente Metals Corporation, seeking to recover money from the defendant, John Urquhart Birnie, among which was the filing of this action, were and are being done and performed by plaintiff, The Permanente Metals Corporation, solely and exclusively on behalf of and at the direct instance and request and under the sole and exclusive direction and control of the United States Maritime Commission; that the plaintiff, The Permanente Metals Corporation, in these respects is acting as agent of the United States Maritime Commission, with full and complete authority to do so; and that this action is, in these circumstances, being brought by the United States Maritime Commission against the defendants, John Urquhart Birnie doing business as Birnie Electric Company, and the Massachusetts Bonding & Insurance Company.

Answering the Allegations Contained in the Alleged Second and Separate Cause of Action of Plaintiff's First Amended Complaint, These Answering Defendants Admit, Deny and Allege:

I.

Defendants repeat, reallege and incorporate herein the same as though specifically set forth all of their admissions, denials and allegations contained in Paragraphs I to XIV, inclusive, of their foregoing answer to the alleged first cause of action of plaintiff's first amended complaint.

II.

Defendants admit the allegations contained in Paragraph II of the alleged second cause of action of plaintiff's first amended complaint except that defendants, and each of them, deny that Performance Bond No. C-28504 referred to in said Paragraph II or any other bond was made or executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States, or to any other person, firm or corporation, for the faithful performance, or for any purpose or performance whatever, by John Urquhart Birnie, doing business as Birnie Electric Company, or by any other person, of or in connection with Special Provision No. 4, or any of its subdivisions, all as contained and set forth in said subcontract VS-14 (Exhibit "A" to plaintiff's complaint). Defendants and each of them further deny that said bond was or is by its terms, or otherwise, binding upon or against the principal or the surety named therein, jointly or severally, or otherwise, or that it has been or is at all, or at any time, in full or any force or effect in respect to said Special Provision No. 4, or any of the subdivisions thereof.

III.

Defendants admit the allegations contained in Paragraph III of the alleged second cause of action of plaintiff's first amended complaint except that defendants, and each of them, deny that Performance Bond No. C-28589 referred to in said Para-

graph III, or any other bond, was made or executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States, or to any other person, firm or corporation for the faithful performance, or for any performance whatever, by John Urquhart Birnie, doing business as Birnie Electric Company, or by any other person, of or in connection with Special Provision No. 4 or any of its subdivisions, all as contained and set forth in said subcontract VS-14. Defendants and each of them further deny that said bond was or is by its terms, or otherwise, binding upon or against the principal or the surety named therein, jointly or severally, or otherwise, or that it has been or is at all or at any time in full or any force or effect in respect to said Special Provision No. 4, or any of the subdivisions thereof.

IV.

Defendants admit the allegations contained in Paragraph IV of the alleged second cause of action of Plaintiff's first amended complaint except that defendants, and each of them, deny that the endorsement to the Bonds Nos. C-28504 and C-28589 referred to in said Paragraph IV, or any other endorsement to said Bonds were made, executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States, or to any other person, firm or corporation, for the faithful performance, or for any performance whatever, by John Urquhart Birnie, doing business as Birnie

Electric Company, or by any other person, of or in connection with Special Provision No. 4 or any of its subdivisions all as contained and set forth in said subcontract VS-14. Defendants, and each of them, further deny that said endorsement to said bonds was or is by its terms, or otherwise, binding upon or against the principal or the surety named therein, jointly or severally, or otherwise, or that it has been or is, at all or at any time in full or any force or effect in respect to said Special Provision No. 4 or any of the subdivisions thereof.

V.

Defendants admit the allegations contained in Paragraph V of the alleged second cause of action of plaintiff's first amended complaint except that the defendants, and each of them, deny that an unnumbered Performance Bond, dated November 9, 1944, referred to in said Paragraph V or any other bond was made or executed or delivered to plaintiff, or to the United States, or to any Governmental agency, board, commission, representative or agent of the United States or to any other person, firm or corporation, for the faithful performance, or for any performance whatever, by John Urquhart Birnie, doing business as Birnie Electric Company, or by any other person, of or in connection with Special Provision No. 4 or any of its subdivisions all as set forth and contained in said subcontract VS-14 or any or all modifications or extensions thereof. Defendants and each of them further deny that said bond was or is by its terms, or otherwise,

binding upon or against the principal or the surety named therein, jointly or severally, or otherwise, or that it has been or is at all or at any time in full or any force or effect in respect to said Special Provision No. 4 or any of the subdivisions thereof.

VI.

Further answering the alleged second cause of action of plaintiff's first amended complaint defendants allege that all of the performance bonds and the endorsement thereto and thereon referred to in Paragraphs II, III, IV and V of the alleged second cause of action in plaintiff's first amended complaint were made, executed and delivered to plaintiff in favor of plaintiff, United States of America, and the United States Maritime Commission, as their interests might appear, for the faithful performance by the principal named therein, to wit, John Urquhart Birnie, doing business as Birnie Electric Company, of his obligations under subcontract VS-14 and the respective Addenda thereto (true copies of said last mentioned documents appear as Exhibits "A," "B," "C" and "D" to plaintiff's complaint); saving and excepting, however, that it was not the purpose or intention of any of the parties to said bonds and the endorsement thereto and thereon, nor was it the purpose or intention of any of the persons in whose favor said bonds and said endorsement thereon were made, to secure or answer for the alleged and purported, though non-existent, obligation of defendant John Urquhart Birnie, doing business as Birnie Electric Company, under Special

Provision No. 4 and the subdivision thereof, all as set forth in said subcontract VS-14.

VII.

Further answering the alleged second cause of action of plaintiff's first amended complaint, defendants allege that this Court is without jurisdiction of said alleged second cause of action of plaintiff's first amended complaint and that the same fails to state a cause of action for the reason that the United States Maritime Commission is not joined as a party to said first amended complaint. The United States Maritime Commission is an indispensable party to plaintiff's first amended complaint for the reason that plaintiff, The Permanente Metals Corporation, and the United States Maritime Commission have a joint interest in the alleged claim for recovery on the bonds referred to in the said alleged second cause of action thereof, which bonds are appended thereto as Exhibits "E," "F," "G" and "H" and which, on their face, are in favor of "The Permanente Metals Corporation and the United States Maritime Commission, as their interests may appear."

Answering the Allegations Contained in the Alleged Third and Separate Cause of Action of Plaintiff's First Amended Complaint, These Answering Defendants Admit, Deny and Allege:

I.

Defendants repeat, reallege and incorporate herein the same as though specifically set forth all of their

admissions, denials and allegations contained in Paragraphs I, II, IV, VI and XIII of their foregoing answer to the alleged first cause of action of plaintiff's first amended complaint.

II.

Defendnt John Urquhart Birnie, doing business as Birnie Electric Company, for himself and not for any other defendant in this action, admits the allegations contained in Paragraph II of the alleged third cause of action of plaintiff's first amended complaint.

III.

Defendant John Urquhart Birnie, doing business as Birnie Electric Company, for himself and not for any other defendant in this action, admits the allegations contained in Paragraph III of the alleged third cause of action of plaintiff's first amended complaint, except that said defendant denies that the sum of \$1,546.66, or any part thereof, or any sum at all, is due or owing or unpaid to plaintiff.

For a First Counterclaim and Cross-Complaint Against The Permanente Metals Corporation and Against United States Maritime Commission, the Cross-Complainant John Urquhart Birnie, Doing Business as Birnie Electric Company, Alleges:

I.

That cross-complainant, John Urquhart Birnie, is now, and was at all times herein mentioned, a resident of the State of California and doing business

in the City of Los Angeles, County of Los Angeles, in said State of California under said name, a business of which defendant and cross-complainant was the sole owner and proprietor.

II.

That at all times mentioned herein the cross-defendant, The Permanente Metals Corporation, was and is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and duly qualified and doing business in the State of California with its principal place of business in the northern district of California.

III.

That Joseph K. Carson, Raymond S. McKeough, Admiral William W. Smith, Granville Mellon and Richard Parkhurst are now the duly appointed, qualified and acting members of the United States Maritime Commission.

IV.

That the jurisdiction of this honorable court depends on a diversity of citizenship between the parties hereto and that the value of the matters involved in this suit is in excess of the sum of \$3,000.00, exclusive of interest and costs.

V.

That on or about May 29, 1944, the cross-complainant, John Urquhart Birnie, and cross-defendant, The Permanente Metals Corporation executed and entered into a written contract denominated

Vessels Subcontract VS-14 and, thereafter, on or about August 10, 1944, entered into a written addendum to said contract, and on or about October 19, 1944, entered into a second written addendum to said contract, and on or about November 20, 1944, entered into a third written addendum to said contract. That true copies of said contract and written addenda thereto are attached to plaintiff's first amended complaint as Exhibits "A," "B," "C" and "D" thereof and are incorporated herein by reference and made a part hereof as though fully set forth herein. That said written subcontract and written addenda thereto were all signed, executed and delivered by both cross-complainant, John Urquhart Birnie, and cross-defendant, The Permanente Metals Corporation, within the State of California.

VI.

That cross-complainant, John Urquhart Birnie, has fully performed all of the terms, covenants and conditions of, and has furnished all of the materials required of him by, said subcontract.

VII.

That the stated contract price of the said subcontract was and is the sum of \$432,604.83, of which sum cross-defendant, The Permanente Metals Corporation, has paid to said cross-complainant the sum of \$389,419.56; and there is now due, owing and unpaid from cross-defendant, The Permanente Metals Corporation, to cross-complainant, John Urquhart

Birnie, under said subcontract, the total sum of \$43,185.27.

VIII.

That cross-complainant is informed and believes, and therefore alleges, that by virtue of a certain prime contract between cross-defendant, The Permanente Metals Corporation, and the United States Maritime Commission, in accordance with which said subcontract VS-14 was signed, executed and delivered, and the terms of which were incorporated therein, the United States Maritime Commission promised and agreed to pay to cross-complainant, John Urquhart Birnie, the sum of \$43,185.27. That there is now due, owing and unpaid from cross-defendant, the United States Maritime Commission, to cross-complainant, John Urquhart Birnie, the said sum of \$43,185.27.

For a second cross-complaint and counterclaim against cross-defendant, The Permanente Metals Corporation, and against cross-defendant, United States Maritime Commission, John Urquhart Birnie, doing business as Birnie Electric Company, alleges:

I.

Repleads and realleges all of the allegations contained in Paragraphs I through IV of cross-complainant's first cross-complaint and counterclaim, to which reference is hereby made, and the same are herein incorporated and referred to in the second counterclaim and cross-complaint and made a part hereof as if the same were fully set forth herein.

II.

That on or about November 28, 1944, the cross-complainant, John Urquhart Birnie, and cross-defendant, The Permanente Metals Corporation, executed and entered into a written contract denominated Vessels Subcontract VS-28 and, thereafter, on or about April 5, 1945, executed and entered into a written addendum to said contract. That true copies of said written contract and written addendum thereto are hereto attached, marked Exhibit "A," and hereby are made a part hereof as fully as if set forth herein. That said written contract and written addendum thereto, Exhibit "A," were all signed, executed and delivered by both cross-complainant and cross-defendant, The Permanente Metals Corporation, within the State of California.

III.

That cross-complainant, John Urquhart Birnie, has fully performed the work required of him and furnished all the materials required of him and fulfilled all the conditions required of him by said Exhibit "A," and has in all respects performed his duty thereunder.

IV.

That the stated contract price of the said subcontract, Exhibit "A," was and is the sum of \$153,327.35, of which sum cross-defendant, The Permanente Metals Corporation, has paid to said cross-complainant the sum of \$83,218.50; and there is now

due, owing and unpaid from cross-defendant, The Permanente Metals Corporation, to cross-complainant, John Urquhart Birnie, under said subcontract, the total sum of \$70,108.85.

V.

That cross-complainant is informed and believes, and therefore alleges, that by virtue of a certain prime contract between cross-defendants, The Permanente Metals Corporation, and the United States Maritime Commission, in accordance with which said subcontract, Exhibit "A," was signed, executed and delivered, and the terms of which were incorporated into said Exhibit "A," the United States Maritime Commission promised and agreed to pay to cross-complainant, John Urquhart Birnie, the sum of \$70,108.85. That there is now due, owing and unpaid from cross-defendant, United States Maritime Commission, to cross-complainant, John Urquhart Birnie, the said sum of \$70,108.85.

For a third cross-complaint and counterclaim against cross-defendant, The Permanente Metals Corporation, and against cross-defendant, United States Maritime Commission, John Urquhart Birnie, doing business as Birnie Electric Company, and the Massachusetts Bonding & Insurance Company, allege:

I.

Replead and reallege the allegations contained in Paragraphs I through VII in cross-complainant

John Urquhart Birnie's first cross-complaint and counterclaim, and Paragraphs II, III and IV in defendant and cross-complainant's second cross-complaint and counterclaim, to which reference is hereby made, and the same are hereby incorporated and referred to and made a part hereof as if fully set forth herein.

II.

That the nature of this complaint is a procedure for a declaratory judgment under Section 274-D, United States Judicial Code, for the purpose of determining a question in actual controversy between the parties, to wit, the question of the construction and interpretation of a written contract as hereinafter set forth.

III.

That between July 31, 1944, and November 9, 1944, cross-complainants John Urquhart Birnie, as principal, and the Massachusetts Bonding & Insurance Company, as surety, for valuable consideration made, executed and delivered to cross-defendant, The Permanente Metals Corporation, four performance bonds all in favor of "The Permanente Metals Corporation and the United States of America, represented by and United States Maritime Commission, as their interests may appear," to secure the faithful performance by cross-complainant, John Urquhart Birnie, of the said subcontract VS-14. That true copies of said performance bonds are attached to plaintiff's first amended complaint on file herein as Exhibits "E," "F," "G" and "H,"

and by reference are made a part hereof as though fully set forth herein.

IV.

That said subcontracts VS-14 and VS-28 were subcontracts under a certain prime contract between the cross-defendant, The Permanente Metals Corporation, and cross-defendant, United States Maritime Commission. That by virtue of the express terms of said subcontracts VS-14 and VS-28, all the terms, covenants and conditions of the said prime contract between cross-defendant and cross-complainant were adopted and incorporated into the aforementioned subcontract.

That the said prime contract and the said subcontracts were negotiated, made and executed as a part of the Emergency Naval Construction Program authorized by the laws of the United States, among which were and are the Act of March 26, 1934 (48 Stat. 503, 34 U.S.C.A. 496), and the Act of October 8, 1940 (54 Stat. 1002, 34 U.S.C.A. 496A). That the said prime contract between cross-defendant, The Permanente Metals Corporation, and cross-defendant, United States Maritime Commission, was a contract for the construction and manufacture of complete naval vessels.

That the aforementioned subcontracts VS-14 and VS-28 between cross-complainant, John Urquhart Birnie, and the cross-defendant, The Permanente Metals Corporation, were contracts for the construction or manufacture of a portion of certain of said complete naval vessels, namely, the installation of equipment in and upon said naval vessels.

V.

That a controversy and dispute have arisen between cross-defendant, The Permanente Metals Corporation, and the cross-complainants, John Urquhart Birnie and the Massachusetts Bonding & Insurance Company, under and out of the said sub-contract VS-14. That the controversy and dispute concern and involve the provisions of Paragraph 4 and subdivision (b) thereof in the case of said contract VS-14, and the provisions of Paragraph 7 and subdivision (b) thereof in the case of said contract VS-28.

The cross-defendant, The Permanente Metals Corporation, contends and asserts that the said provisions of Paragraph 4 and subdivision (b) thereof of said contract VS-14, and said Paragraph 7 and subdivision (b) thereof of said contract VS-28 with reference to payment by cross-complainant, John Urquhart Birnie, to the cross-defendant, The Permanente Metals Corporation, of all profits to cross-complainant, John Urquhart Birnie, under said contract as shall be determined by the United States Maritime Commission to be in excess of ten per cent of the total contract prices, such profits to become the sole property of the United States Maritime Commission, are valid and in effect. Cross-defendant, The Permanente Metals Corporation, has demanded of cross-complainant, John Urquhart Birnie, that he pay to the cross-defendant the sum of \$148,946.57 as such excess profits due under said contract VS-14.

Further, cross-defendant, The Permanente Metals Corporation, asserts and claims that under and by

virtue of the terms and conditions of the aforementioned bonds the Massachusetts Bonding & Insurance Company is bound jointly and severally with cross-complainant, John Urquhart Birnie, to account for and pay to the cross-defendant, The Permanente Metals Corporation, the excess profits allegedly due under the provisions of Paragraph 4 and subdivision (b) thereof.

Cross-complainants, John Urquhart Birnie and the Massachusetts Bonding & Insurance Company in the case of VS-14, and the cross-complainant, John Urquhart Birnie in the case of VS-28, contend and assert that the said provisions calling for payment of said excess profits, said payment to become the sole property of the United States Maritime Commission, are void and without effect under and by virtue of Section 401 of Title IV of the Second Revenue Act of 1940 (54 Stat. 1003, 34 U.S.C.A. 496A).

Further, cross-complainant, Massachusetts Bonding & Insurance Company, contends and asserts that, without regard to the effectiveness and validity of the provisions of Paragraph 4, subdivision (b), for any purpose, the terms and provisions of the aforementioned bonds in no event require it to pay as surety any part of such excess profits as are allegedly due, and that it was not the intention of any of the parties to the aforementioned bonds that the Massachusetts Bonding & Insurance Company should be liable for the faithful performance by cross-complainant, John Urquhart Birnie, of any such provisions.

Cross-complainants, John Urquhart Birnie and Massachusetts Bonding & Insurance Company, in the case of said contract VS-14, and cross-complainant, John Urquhart Birnie, in the case of said contract VS-28, contend and assert that the said contracts, VS-14 and VS-28, and the prime contract under which said VS-14 and VS-28 were subcontracts, were and are contracts for the construction and manufacture of complete naval vessels and portions thereof, and were entered into in a taxable year to which the excess profits tax provided in subchapter E of chapter 2 of the United States Internal Revenue Code is applicable and would be applicable if the sub-contractor, to wit, cross-complainant John Urquhart Birnie, were a corporation; that said Paragraph 4, subdivision (b) thereof in said VS-14, and Paragraph 7, subdivision (b) thereof in VS-28, are void and of no effect by reason of the statute above referred to; and that, therefore, cross-complainants John Urquhart Birnie and Massachusetts Bonding & Insurance Company, or either of them, are not obligated to pay to cross-defendant, The Permanente Metals Corporation, or to the United States Maritime Commission through The Permanente Metals Corporation, any profits made by cross-complainant, John Urquhart Birnie, in excess of ten per cent of the total contract price of said contract, or in any amount. And that, on the contrary, cross-defendant, The Permanente Metals Corporation, and the cross-defendant, United States Maritime Commission, are indebted to cross-complainant, John Urquhart Birnie, in the amount of

\$113,377.79 on account of work done and materials furnished by cross-complainant, John Urquhart Birnie, to the cross-defendant under and in accordance with the provisions of said contracts, VS-14 and VS-28.

VI.

That cross-complainants, John Urquhart Birnie and the Massachusetts Bonding & Insurance Company, are informed and believe and, basing their allegations upon such information and belief, allege that by virtue of the provisions of the contracts as set forth in the foregoing Paragraph V, the cross-defendant, United States Maritime Commission, is the only party to be benefitted by any recovery under the terms of the contracts. That the cross-defendant, United States Maritime Commission, is the real party in interest.

VII.

That cross-complainants, John Urquhart Birnie and the Massachusetts Bonding & Insurance Company, are informed and believe and, basing their allegations upon such information and belief, allege that the acts of cross-defendant, The Permanente Metals Corporation, seeking to recover money from the cross-complainant, John Urquhart Birnie, among which was the filing of this action, were and are being done and performed by cross-defendant, The Permanente Metals Corporation, solely and exclusively on behalf of and at the direct instance and request and under the sole and exclusive direction and control of the cross-defendant, United States

Maritime Commission; that the cross-defendant, The Permanente Metals Corporation, in these respects is acting as agent of the cross-defendant, United States Maritime Commission, with full and complete authority to do so; and that this action is, in these circumstances, being brought by the United States Maritime Commission against the cross-complainants, John Urquhart Birnie, doing business as Birnie Electric Company, and the Massachusetts Bonding & Insurance Company.

Wherefore, defendants and cross-complainants pray :

1. That plaintiff and cross-defendant, The Permanente Metals Corporation, and the cross-defendant, United States Maritime Commission, or either of them, take nothing by virtue of the first amended complaint on file herein;

2. That defendant and cross-complainant, John Urquhart Birnie, doing business as Birnie Electric Company, have judgment against plaintiff and cross-defendant, The Permanente Metals Corporation, and cross-defendant, United States Maritime Commission, in the sum of \$111,832.13;

3. That the court declare the rights and obligations of plaintiff and cross-defendants and defendants and cross-complainants under said contracts VS-14 and VS-28;

4. That the court find and declare that Paragraph 4 and subdivision (b) thereof of said contract VS-14 and Paragraph 7 and subdivision (b) thereof of said contract VS-28 are void and without effect; and that defendant and cross-complainant, John

Urquhart Birnie, doing business as Birnie Electric Company, and defendant and cross-complainant, Massachusetts Bonding & Insurance Company, or either of them, are not bound or obligated to pay to plaintiff and cross-defendant or to cross-defendant, United States Maritime Commission, profits in excess of ten per cent of the total contract price of said contracts VS-14 and VS-28, or either of them, or any profits or any money whatsoever;

5. That the court find and declare the amount owing by plaintiff and cross-defendant to defendant and cross-complainant, John Urquhart Birnie, doing business as Birnie Electric Company, for and on account of defendant and cross-complainant John Urquhart Birnie's performance of said contracts VS-14 and VS-28, and find and declare the amount owing by cross-defendant, United States Maritime Commission, to defendant and cross-complainant, John Urquhart Birnie, arising therefrom;

6. That defendants and cross-complainants, John Urquhart Birnie, doing business as Birnie Electric Company, and the Massachusetts Bonding & Insurance Company, be given judgment for their costs and disbursements in this action, and for any other and further relief which to the court may seem just and proper.

HILL, MORGAN & FARRER,
TINNING & DeLAP,
MELLIN AND HANSCOM,

By /s/ OSCAR A. MELLIN,

Attorneys for Defendants and
Cross-Complainants.

Receipt of a copy of the within Answer to First Amended Complaint, Cross-Complaint and Counterclaim of John Urquhart Birnie and Massachusetts Bonding and Insurance Company, a corporation, is hereby acknowledged this 7th day of April, 1947.

BRUCE WALKUP,
WILLIS S. SLUSSER,
THELEN, MARRIN, JOHNSON
& BRIDGES,

By /s/ BRUCE WALKUP,
Attorneys for Plaintiff and
Cross-Defendants.

United States of America,
Northern District of California,
Southern Division—ss.

John Urquhart Birnie, being first duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the foregoing Answer, Cross-Complaint and Counterclaim, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ JOHN URQUHART BIRNIE.

Subscribed and sworn to before me this 2nd day of April, 1947.

[Seal] /s/ E. L. STIMPSON,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires Jan. 30, 1950.

EXHIBIT "A"

Subcontract

United States Maritime Commission

Contract Nos. MCc-15726

[See pages 79-80 of this printed record]:

Terms and Conditions

Revision No. 2 5-43

[See pages 22 to 38 of this printed record.]

[Endorsed]: Filed April 9, 1947.

[Title of District Court and Cause.]

ANSWER OF THE PERMANENTE METALS
CORPORATION, A CORPORATION, TO
COUNTERCLAIM AND CROSS-COM-
PLAINT OF JOHN URQUHART BIRNIE,
AN INDIVIDUAL DOING BUSINESS AS
BIRNIE ELECTRIC COMPANY, AND
MASSACHUSETTS BONDING AND
INSURANCE COMPANY, A CORPORA-
TION

Plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, for itself and not for any other cross-defendant in this action, answers the first counterclaim and cross-complaint as follows:

I.

Answering Paragraph I, admits that cross-complainant, John Urquhart Birnie, is now and was at all times therein mentioned, a resident of the State of California. Cross-defendant is without knowledge sufficient to enable it to answer the remaining allegations of said paragraph.

II.

Admits the allegations of Paragraph II.

III.

Admits the allegations of Paragraph III.

IV.

Admits the allegations of Paragraph IV.

V.

Admits the allegations of Paragraph V.

VI.

Answering Paragraph VI, admits that cross-complainant, John Urquhart Birnie, has furnished all of the materials required of him by said subcontract; denies that cross-complainant, John Urquhart Birnie, has fully performed all of the terms, covenants, and conditions of said subcontract and in this connection alleges that cross-complainant, John Urquhart Birnie, has failed to pay to cross-defendant, The Permanente Metals Corporation, the excess profits in the sum of \$148,946.57 realized by cross-complainant, John Urquhart Birnie, in the performance of the subcontract, as determined by United States Maritime Commission, as more particularly set forth in the first cause of action of the amended complaint on file herein, and has otherwise failed to perform and comply with the requirements of Paragraph 4 of said subcontract.

VII.

Answering Paragraph VII, denies that the stated contract price of the said subcontract was and is

the sum of \$432,688.50, and in this connection alleges that the stated contract price of the said subcontract was and is the sum of \$430,963.95. Admits that cross-defendant, The Permanente Metals Corporation, has paid to cross-complainant, John Urquhart Birnie, the sum of \$389,419.56. Denies that there is now due, owing or unpaid from cross-defendant, The Permanente Metals Corporation, to cross-complainant, John Urquhart Birnie, under said subcontract or otherwise, the total sum of \$43,268.94, or any other sum whatsoever, and in this connection alleges that there is now due, owing and unpaid from cross-complainant John Urquhart Birnie to cross-defendant, The Permanente Metals Corporation, under and pursuant to said subcontract, the sum of \$148,946.57, as more particularly set forth in the first cause of action of the first amended complaint herein.

VIII.

Denies the allegations of Paragraph VIII and denies that there is now due, owing and unpaid from cross-defendant, United States Maritime Commission, to cross-complainant, John Urquhart Birnie, the sum of \$43,268.94, or any other sum whatsoever.

Plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, for itself and not for any other cross-defendant in this action, answers the second counterclaim and cross-complaint as follows:

I.

Answering Paragraph I, cross-defendant repleads all of its answers to Paragraphs I through IV of cross-complainants' first cross-complaint and counterclaim by reference as though the same were fully set forth herein.

II.

Admits the allegations of Paragraph II.

III.

Answering Paragraph III, admits that cross-complainant, John Urquhart Birnie, has furnished all of the materials required to be furnished by him under said subcontract VS-28, and, except as herein expressly admitted, denies the remaining allegations of said paragraph.

IV.

Answering Paragraph IV, admits that the stated contract price of said subcontract VS-28 was and is the sum of \$153,327.35; admits that cross-defendant, The Permanente Metals Corporation, has paid to cross-complainant, John Urquhart Birnie, the sum of \$83,218.50; denies that there is now due, owing or unpaid from cross-defendant, The Permanente Metals Corporation, to cross-complainant, John Urquhart Birnie, under said subcontract VS-28, or otherwise, the total sum of \$70,108.85, and in this connection alleges: Said subcontract VS-28 contained a Special Provision No. 7, to which reference is hereby made, whereby cross-complainant, John Urquhart Birnie, agreed to account for and

pay to cross-defendant, The Permanente Metals Corporation, profits realized by cross-complainant, John Urquhart Birnie, in the performance of said subcontract, as determined by the United States Maritime Commission to be in excess of ten per cent of the total contract price, such amounts so paid to become the sole property of the United States Maritime Commission. After cross-complainant, John Urquhart Birnie, had completed the work to be performed by cross-complainant, John Urquhart Birnie, under said subcontract VS-28 and the Addendum thereto, and on February 25, 1947, the United States Maritime Commission duly and regularly determined by action of the United States Maritime Commission at Washington, D. C., that the amount of such excess profits under Special Provision No. 7, which cross-complainant, John Urquhart Birnie, agreed to pay to cross-defendant, The Permanente Metals Corporation, to become the sole property of the United States Maritime Commission as aforesaid, was the sum of \$35,421.26, computed as follows:

Stated Contract Price	\$153,327.35
-----------------------------	--------------

Cost of Performance	\$102,573.35
---------------------------	--------------

Allowable Profit	15,332.74
------------------------	-----------

Total	\$117,906.09
-------------	--------------

Recapturable Profits	\$ 35,421.26
----------------------------	--------------

Said determination provided that the Secretary of the United States Maritime Commission should notify cross-complainant, John Urquhart Birnie, of

the action of the United States Maritime Commission in making said determination with respect to the excess profits realized under said sub-contract VS-28 and that unless cross-complainant, John Urquhart Birnie, within thirty days from the date of the notice of such action should request a hearing with respect to such determination by the United States Maritime Commission, such determination should become final. Pursuant to such provision of such determination, the Secretary of the United States Maritime Commission, on or about February 25, 1947, duly notified cross-complainant, John Urquhart Birnie, of the said action of the United States Maritime Commission and thereafter and prior to the date of the filing of the first amended complaint herein, cross-complainant, John Urquhart Birnie, duly waived the right to request a hearing with respect to such determination and said determination has now become final.

Alleges that cross-defendant, The Permanente Metals Corporation, is now indebted to cross-complainant, John Urquhart Birnie, in the sum of \$34,687.59 under said subcontract VS-28 but alleges that said sum of \$34,687.59 is being lawfully withheld by cross-defendant, The Permanente Metals Corporation, from cross-complainant, John Urquhart Birnie, as an offset against the sum of \$148,946.57 and the further sum of \$1,545.66 owed to cross-defendant, The Permanente Metals Corporation, by cross-complainant, John Urquhart Birnie, as more particularly alleged in the first amended complaint herein.

V.

Denies the allegations of Paragraph V and denies that there is now due, owing and unpaid from cross-defendant, United States Maritime Commission, to cross-complainant, John Urquhart Birnie, the sum of \$70,108.85, or any other sum whatsoever.

Plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, for itself and not for any other cross-defendant in this action, answers the third counterclaim and cross-complaint as follows:

I.

Answering Paragraph I, cross-defendant, The Permanente Metals Corporation, repleads all of its answers to Paragraphs I through VII of the first cross-complaint and counterclaim and Paragraphs II, III and IV of the second cross-complaint and counterclaim by reference, as though the same were fully set forth herein:

II.

Admits the allegations of Paragraph II.

III.

Admits the allegations of Paragraph III.

IV.

Answering Paragraph IV, admits that said subcontracts VS-14 and VS-28 were subcontracts under a certain prime contract or certain prime contracts between cross-defendant, The Permanente Metals

Corporation, and cross-defendant, United States Maritime Commission. Denies that by virtue of the express terms of said subcontracts VS-14 and VS-28, all of the terms, covenants and conditions of the said prime contract or prime contracts between cross-defendant, The Permanente Metals Corporation, and cross-defendant, United States Maritime Commission, were adopted and incorporated into the said subcontracts except as provided by Article 43 of the Terms and Conditions of Subcontracts VS-14 and VS-28 with reference to Prime Contract MCE-15762, and to the extent, if any, that the terms, covenants and conditions of Prime Contract MCE-36452 may be incorporated by virtue of the reference thereto in Addendum No. 1 to Subcontract VS-28. Except as herein expressly admitted or alleged, denies all of the remaining allegations in said paragraph.

V.

Answering Paragraph V, admits and alleges that a controversy and dispute has arisen and now exists between cross-defendant, The Permanente Metals Corporation, and cross-complainants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, under and out of said subcontracts VS-14 and VS-28. Admits that said controversy and dispute concerns and involves, among other things, the provisions of paragraph 4 and subdivision (b) thereof in the case of subcontract VS-14, and the provisions of Paragraph 7 and subdivision (b) thereof in the case of subcontract VS-28. Admits that cross-defendant, The Permanente Metals

Corporation, contends and asserts, among other things, that subcontract VS-14 and subcontract VS-28 are valid and in effect and that the provisions of paragraph 4 of subcontract VS-14 and paragraph 7 of subcontract VS-28 are likewise valid and in effect. Admits and alleges further that cross-defendant, The Permanente Metals Corporation, has demanded of cross-complainant, John Urquhart Birnie, and of cross-complainant, Massachusetts Bonding and Insurance Company, that they pay to cross-defendant the sum of \$148,946.57 as excess profits due under subcontract VS-14. Further admits and alleges that cross-defendant, The Permanente Metals Corporation, asserts and claims that under and by virtue of the terms and conditions of the said bonds, Massachusetts Bonding and Insurance Company is bound jointly and severally with cross-complainant, John Urquhart Birnie, to account for and pay to cross-defendant, The Permanente Metals Corporation, the excess profits due under the provisions of paragraph 4 of subcontract VS-14 and paragraph 7 of subcontract VS-28. Further answering said paragraph and particularly the allegations thereof commencing on line 17, page 20 and ending on line 3, page 22, admits that cross-complainant, Massachusetts Bonding and Insurance Company, contends and asserts as therein alleged and that cross-complainant, John Urquhart Birnie, contends and asserts as therein alleged, and except as herein expressly admitted and alleged, denies all of the remaining allegations in said paragraph.

VI.

Answering the allegations of Paragraph VI, denies that cross-defendant, United States Maritime Commission, is the only party to be benefitted by any recovery under the terms of said subcontracts and in this connection alleges that cross-defendant, United States Maritime Commission, contends and asserts that cross-defendant, The Permanente Metals Corporation, is obligated to collect such excess profits as determined by the United States Maritime Commission from Cross-complainant, John Urquhart Birnie, such excess profits, when collected from cross-complainant, John Urquhart Birnie, by cross-defendant, The Permanente Metals Corporation, to be the sole property of United States Maritime Commission. Denies that cross-defendant, United States Maritime Commission, is the real party in interest and in this connection alleges that cross-complainant, John Urquhart Birnie, contracted with cross-defendant, The Permanente Metals Corporation, by said subcontracts VS-14 and VS-28 to pay to cross-defendant, The Permanente Metals Corporation, for the benefit of the United States Maritime Commission, such excess profits and did not contract to pay such excess profits directly to United States Maritime Commission. Except as herein expressly admitted and alleged, denies the remaining allegations of said paragraph.

VII

Answering Paragraph VII, denies all of the allegations thereof.

VIII.

As a further defense to said third cross-complaint and counterclaim, defendant alleges as follows:

All of the alleged issues upon which defendants and cross-complainants seek a declaratory judgment are involved in and necessarily will be determined by the Court herein in the disposition of the issues raised by the amended complaint and the answer of defendants and cross-complainants thereto, and the first two cross-complaints and counterclaims and the answer of cross-defendants thereto, and there is, therefore, no necessity for this Court to undertake to render a declaratory judgment upon such issues. An adjudication in the cross-complaint and counterclaim for declaratory judgment will not settle the whole controversy between the parties but will settle only some of the issues in dispute between the parties, leaving the balance of the issues for determination in the other causes of action set forth in the amended complaint and the cross-complaint herein, thereby resulting in a piecemeal determination of all the matters in controversy between the parties. The affirmative relief in damages sought by the various parties hereto can be obtained most expeditiously and effectively by the granting by the Court of the prayer for affirmative relief in damages of the party entitled thereto as found by the Court rather than by the granting by the Court of a judgment of declaratory relief declaring the respective rights of the parties.

Wherefore, plaintiff and cross-defendant, The Permanente Metals Corporation, prays:

(1) That defendants and cross-complainants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, take nothing by virtue of their cross-complaint and counterclaim herein;

(2) That plaintiff and cross-defendant, The Permanente Metals Corporation, have judgment against defendants and cross-complainants, John Urquhart Birnie, doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, as requested in the first amended complaint on file herein;

(3) That plaintiff and cross-defendant, The Permanente Metals Corporation, have judgment for its costs of suit herein incurred and for such other and further relief as may be proper.

By /s/ BRUCE WALKUP,
WILLIS S. SLUSSER,
THELEN, MARRIN,
JOHNSON & BRIDGES,

By /s/ BRUCE WALKUP,
Attorneys for Plaintiff and Cross-Defendant, The
Permanente Metals Corporation, a Corporation.

Receipt of a copy of the written answer is acknowledged this 2nd day of September, 1947.

[Endorsed]: Filed Sept. 5, 1947.

[Title of District Court and Cause.]

ANSWER OF CROSS-DEFENDANT UNITED
STATES MARITIME COMMISSION TO
COUNTER-CLAIM AND CROSS-COM-
PLAINT OF JOHN URQUHART BIRNIE

Cross-Defendant United States Maritime Com-
mission answers the first counter-claim and cross-
complaint as follows:

I.

Cross-Defendant does not have sufficient informa-
tion or belief to answer the allegations of Para-
graph I and demands strict proof thereof.

II.

Admits the allegations of Paragraph II.

III.

Admits the allegation sof Paragraph III.

IV.

Denies the allegations of Paragraph IV.

V.

Admits the allegations of Paragraph V.

VI.

Answering Paragraph VI, admits that Cross-
Complainant John Urquhart Birnie has furnished
all of the materials required of him by said sub-
contract: Denies that Cross-Complainant John

Urquhart Birnie has fully performed all of the terms, covenants and conditions of said subcontract, and in this connection alleges, upon information and belief, that Cross-Complainant John Urquhart Birnie has failed to pay to Cross-Defendant The Permanente Metals Corporation excess profits in the sum of \$148,946.57, realized by Cross-Complainant John Urquhart Birnie in the performance of the subcontract as determined by Cross-Defendant United States Maritime Commission.

VII.

Answering Paragraph VII, denies that the stated contract price of the said subcontract was and is the sum of \$432,688.50, and in this connection alleges that the stated contract price of the said subcontract was and is the sum of \$430,963.95; admits that Cross-Defendant The Permanente Metals Corporation has paid to Cross-Complainant John Urquhart Birnie the sum of \$389,419.56; Denies that there is now due, owing or unpaid from Cross-Defendant The Permanente Metals Corporation to Cross-Complainant John Urquhart Birnie under said subcontract, or otherwise, the total sum of \$43,268.94, or any other sum whatsoever.

VIII.

Denies the allegations of Paragraph VIII, and denies that there is now due, owing and unpaid from Cross-Defendant United States Maritime

Commission to Cross-Complainant John Urquhart Birnie the sum of \$43,268.94, or any other sum whatsoever.

Cross-Defendant United States Maritime Commission answers the second counter-claim and cross-complaint as follows:

I.

Answering Paragraph I, Cross-Defendant repleads all of its answers to Paragraphs I through IV of Cross-Complainant's first counter-claim and cross-complaint by reference as though the same were fully set forth herein.

II.

Admits the allegations of Paragraph II.

III.

Answering Paragraph III, admits that Cross-Complainant John Urquhart Birnie has furnished all of the materials required to be furnished by him under said subcontract VS-28, and, except as herein expressly admitted, denies the remaining allegations of said Paragraph.

IV.

Answering Paragraph IV, admits that the stated contract price of the said subcontract VS-28 was and is the sum of \$153,327.35. Admits that Cross-Defendant The Permanente Metals Corporation has paid to said Cross-Complainant John Urquhart Birnie the sum of \$83,218.50; Denies that there is

now due, owing or unpaid from the Cross-Defendant The Permanente Metals Corporation to Cross-Complainant John Urquhart Birnie under said sub-contract VS-28, or otherwise, the total sum of \$70,108.85, or any part thereof, except the sum of \$34,687.59, which Cross-Defendant is informed and believes is being lawfully withheld by Cross-Defendant The Permanente Metals Corporation from Cross-Complainant John Urquhart Birnie as an off-set.

V.

Denies the allegations of Paragraph V and denies that there is now due, owing and unpaid from Cross-Defendant United States Maritime Commission to Cross-Complainant John Urquhart Birnie the sum of \$70,108.85, or any part thereof.

Cross-Defendant United States Maritime Commission answers the third counter-claim and cross-complaint as follows:

I.

Answering Paragraph I, Cross-Defendant United States Maritime Commission repleads all of its answers to Paragraphs I through VII of the first counter-claim and cross-complaint, and Paragraphs II, III, and IV of the second counter-claim and cross-complaint, by reference as though the same were fully set forth herein.

II.

Denies the allegations of Paragraph II.

III.

Admits the allegations of Paragraph III.

IV.

Answering Paragraph IV, admits that said sub-contracts VS-14 and VS-28 were subcontracts under a certain prime contract or certain prime contracts between Cross-Defendant The Permanente Metals Corporation and Cross-Defendant United States Maritime Commission, and, except as herein expressly admitted, denies the remaining allegations of said Paragraph.

V.

Denies the allegations of Paragraph V: Denies that Cross-Defendant United States Maritime Commission is indebted to Cross-Complainant John Urquhart Birnie in the sum of \$113,377.79, or any part thereof.

VI.

Denies the allegations of Paragraph VI.

VII.

Denies the allegations of Paragraph VII.

Wherefore, Cross-Defendant United States Maritime Commission prays:

I.

That Defendants and Cross-Complainants take nothing by virtue of their counter-claims and cross-complaints herein.

II.

That Cross-Defendant United States Maritime Commission have judgment for its costs of suit

herein incurred, and for such other and further relief as may be proper.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant United States Attorney, Attorneys for
Cross-Defendant United States Maritime Commission.

[Endorsed]: Filed Mar. 11, 1948.

[Title of District Court and Cause.]

ORDER

It is Ordered that plaintiff have judgment against defendant John Urquhart Birnie in the sum of \$1,545.66 with legal interest, and against defendants John Urquhart Birnie and Massachusetts Bonding & Insurance Company, a corporation in the sum of \$148,946.57 less \$34,687.59 held as a set-off by plaintiff, for a total of \$114,258.98, with legal interest, attorneys' fees in the sum of \$15,000, and for costs of suit herein.

Plaintiff shall prepare findings of fact and conclusions of law in compliance with the local rules.

Dated: July 20th, 1950.

/s/ DAL M. LEMMON,
U. S. District Judge.

[Endorsed]: Filed July 20, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial, and the Court having heard the evidence and considered the stipulations and admissions of the parties, finds the facts and states the conclusions of law as follows:

Findings of Fact

1. Plaintiff and cross-defendant The Permanente Metals Corporation, hereinafter called "Permanente," was and is a Delaware Corporation, and during the period of time involved in this action was engaged in the business of ship construction at Richmond, California, in the Northern District of California, under construction contracts with the United States Maritime Commission.

2. Defendant and cross-complainant John Urquhart Birnie, hereinafter called "Birnie," was and is a citizen and resident of California and during the period of time involved in this action was engaged in the electrical business in the Northern District of California, doing business as Birnie Electric Company, of which Company he was sole owner.

3. Defendant and cross-complainant Massachusetts Bonding and Insurance Company, hereinafter called "the Bonding Company," was and is a Massachusetts corporation engaged in business in the Northern District of California.

4. Cross-defendant United States Maritime Com-

mission, hereinafter called "the Commission," was and is an agency of the United States.

5. The amount involved in this litigation exceeds, exclusive of interest and costs, the sum of \$3,000.00.

6. On or about April 22, 1943, Permanente and the Commission entered into a written prime contract designated Contract MCc 15762, hereinafter called "the Prime Contract," whereby Permanente agreed, as prime contractor, to construct for the Commission 77 vessels designated as Commission hulls Nos. 525 to 601, inclusive.

7. Said Prime Contract was entered into by the Commission under the authority of Public Laws 247 and 630 of the 77th Congress.

8. Such 77 vessels covered by the Prime Contract were steel hulled, steam-propulsive powered, cargo carrying vessels of the Commission design VC2-S-AP2, such vessels being commonly known as, and hereinafter called "AP2s." Such design, "VC2-S-AP2," designates a Victory Cargo vessel, between 400 and 450 feet long, steam-propulsion, second modification of the AP class of vessel under the Commission's system of letter designations. The Commission's letter designation "AP" is an identifying letter classification assigned to this particular class of vessel. Such AP2s were designed by the Commission in collaboration with an independent naval architect and marine engineer and were basically merchant cargo carrying vessels, designed for use in the United States Merchant Marine.

9. Said Prime Contract was amended by an Addendum No. 1 thereto, dated November 2, 1944, by an Addendum No. 2 thereto, dated December 7, 1944, by an Addendum No. 3 thereto, dated April 1, 1945, and by an Addendum No. 4 thereto, dated June 5, 1947.

10. By said Addendum No. 2, Permanente agreed, among other things, to construct 22 of the vessels included under the Prime Contract, and being Commission hulls Nos. 552 to 573, inclusive, as troop ships in accordance with Commission design VC2-S-AP5, such vessels being commonly known as, and hereinafter called "AP5s," rather than as AP2s in accordance with Commission design VC2-S-AP2.

11. Such 22 AP5s, Commission hulls Nos. 552 to 573, inclusive, covered by said Addendum No. 2, were steel hulled, steam-propulsive powered, cargo carrying vessels of Commission design VC2-S-AP5. Said design "VC2-S-AP5" designates a Victory Cargo vessel, between 400 and 450 feet long, steam-propulsion, fifth modification of the AP class of vessel under the Commission's said system of letter designations. Such AP5s were designed by the Commission in collaboration with an independent naval architect and marine engineer. Such AP5s were basically merchant cargo carrying vessels, designed for use in the United States Merchant Marine, with conversion features suitable to equip them as naval auxiliaries in time of war. The design of the AP5s was basically the same as the design of the AP2s, but with additional

conversion features to make such vessels suitable for carrying troops in time of war. Such conversion features did not affect the basic design common to the AP2s and AP5s as cargo carrying merchant vessels, and in the designing of the AP5s the Commission held such conversion features to a practical minimum so as not to destroy the value of said AP5s for rehabilitation to cargo vessels for peacetime use. Many of the AP5s constructed for the Commission have been restored to merchant cargo vessels after use in carrying troops during wartime.

12. Such AP5s, Commission hulls Nos. 552 to 573, inclusive, were constructed by Permanente for the Commission under Commission construction standards and specifications, which differed in some respects from the construction standards of the Navy Department, the latter being much more stringent than those customarily used to construct merchant cargo vessels. Each of the vessels under said Prime Contract was required to be built under standards of the American Bureau of Shipping which applied to commercial vessels and differed from the Navy Department Standards.

13. Such 22 AP5s, Commission hulls Nos. 552 to 573, inclusive, were delivered by Permanente upon completion into the custody, control, and possession of the Commission, and title to said AP5s was vested in the Commission at all times during construction and to and including the time of such delivery. Permanente was paid by the Commission for the construction of said AP5s in accordance

14. On or about May 29, 1944, Permanente and Birnie entered into a written subcontract under said Prime Contract, such subcontract being designated as Vessels Subcontract No. VS-14, hereinafter called "VS-14." Said VS-14 provided that it was subject to approval by the Commission and it was duly approved by the Commission.

15. Said VS-14 was amended by an Addendum No. 1 thereto, dated August 10, 1944, and by an Addendum No. 2 thereto, dated October 19, 1944, and by an Addendum No. 3 thereto, dated November 20, 1944. Each such Addendum provided that it was subject to approval by the Commission and was duly approved by the Commission.

16. Under said VS-14, as amended by said Addenda thereto, Birnie agreed, as subcontractor, to install certain features of an electrical nature upon said 22 AP5s, Commission hulls Nos. 552 to 573, inclusive. In VS-14 the vessels were designated as "Single Screw Cargo Vessel—U.S.M.C. Design VC2-S-AP5." The said features to be installed by Birnie were Degaussing, Radar, Voice Tube, Mechanical Telegraph, and Mechanical Wireways. Such features to be installed by Birnie upon said AP5s were substantially the same features as those installed upon the AP2s constructed under said Prime Contract, with the exception of Radar, which was not a feature of said AP2s. Installation of such items on vessels during wartime was not limited to installation on combatant type vessels or vessels of the United States Navy, but such items were commonly installed on merchant cargo vessels

which would be used under wartime conditions. Practically all cargo vessels were equipped with certain safety features during wartime and contained features such as guns, gun crew emplacements, degaussing systems, voice tubes, and mechanical telegraphs.

17. Said VS-14 contained a Special Provision No. 4, hereinafter called "Special Provision No. 4," which provided, in part, as follows:

"4. Report of Cost—Excess Profits: The Subcontractor (Birnie) agrees to account for and pay to the Contractor (Permanente) certain profits derived under this contract, and for such purposes agrees:

"(a) To make a report under oath to the Commission care of the Contractor upon completion of this contract, setting forth in the form prescribed by the Commission the total contract price, the total cost of performing the contract, the amount of Subcontractor's overhead charged to such cost, the net profits and the percentage such net profit bears to the contract price, and such other information as the Commission shall prescribe;

"(b) To pay to the Contractor profit as shall be determined by the Commission in excess of ten (10) per cent of the total contract price which amount shall become the sole property of the Commission.

"(c) To make no subdivisions of any contract or subcontract for the same article or articles for the purpose of evading the provi-

sions of this Article; and any subdivision of any contract or subcontract involving an amount in excess of \$10,000 shall be subject to the conditions prescribed in this article; provided that agreements for the purchase of material and/or for the rental of equipment shall not be considered as subdivisions of any contract or subcontract within the meaning of this section;

“(d) That the books, files and all other records of the Subcontractor or any holding, subsidiary, affiliated, or associated company, shall at all times be subject to inspection and audit by any person designated by the Contractor or the Commission, and the premises shall at all times be subject to inspection by the agents of the Commission and Contractor.

“It is further understood and agreed that the Commission shall prescribe the method of determining the Subcontractor's profits: Provided, that, in computing such profits no salary of more than \$25,000 per year to any individual shall be considered as a part of the cost and no cost will be allowed which, in the judgment of the Commission, is not fair and just or is in excess of a reasonable market price for commodities or goods or services purchased or charged.

Although the accounting for profits and payments to be made under the provisions of this Article shall be in accordance with the provisions of Section 505 (b) of the Merchant

Marine Act, 1936, as amended and the regulations of the Commission issued pursuant thereto, the losses incurred in connection with the performance of this contract shall not be used in connection with computing profits derived under any other contracts that the Subcontractor may have with the Contractor or Commission and losses incurred in connection with such other contracts shall not be used in connection with computing profits derived under this contract, it being understood and agreed that the obligation of the Subcontractor to make payments under this Article is contractual and that such payments shall in effect constitute a reduction of the amount of the contract price which the Contractor is entitled to retain.”

18. Permanente has done and performed all acts and things required on its part to be done or performed under VS-14 and the Addenda thereto.

19. Birnie has done and performed all acts and things required on his part to be done or performed under VS-14 and the Addenda thereto, except with respect to the performance of Birnie’s obligations to account for and repay excess profits under Special Provision No. 4, and to pay attorney’s fees under Article 29 thereof.

20. Birnie did not make a report under oath to the Commission in care of Permanente upon completion of VS-14 as required by Subdivision (a) of Special Provision No. 4.

21. After Birnie completed the work to be performed by him under VS-14 and the Addenda

thereto, and on February 25, 1947, the Commission made a determination, pursuant to Special Provision No. 4, that the amount of excess profits which Birnie agreed to repay to Permanente, to become the sole property of the Commission, was the sum of \$190,-490.96, computed as follows:

Contract Price.....		\$430,963.95
Cost of Performance.....	\$197,376.59	
Allowable Profit (10% of Contract Price).....	43,096.40	240,472.99
	<hr/>	<hr/>
Recapturable Profits.....		\$190,490.96

22. Said determination by the Commission as to the amount of excess profits provided that the Secretary of the Commission should notify Birnie of the action of the Commission in making said determination and that unless Birnie, within 30 days from the date of notice of such determination, should request a hearing with respect to such determination, such determination should become final. On or about March 3, 1947, the Secretary of the Commission notified Birnie of said determination and Birnie did not thereafter within said 30 day period request a hearing with respect to such determination and such determination became final. The amount of such determination is correct.

23. Prior to the making of such determination of excess profits by the Commission, Permanente paid to Birnie under VS-14 the sum of \$389,419.56. Such sum paid was \$148,946.57 in excess of \$240,-472.99, the total amount due to Birnie, as determined by the Commission under VS-14.

24. Thereafter, and on or about March 20, 1947, Permanente made a demand upon Birnie and the Bonding Company for the payment to Permanente of said sum of \$148,946.57, representing excess profits, but Birnie and the Bonding Company refused to pay any part of said sum to Permanente.

25. Said VS-14 contained a Term and Condition, designated as Article 29, which provided as follows:

“Attorneys’ Fees: Subcontractor (Birnie) hereby agrees to pay to Contractor (Permanente) a reasonable sum as attorneys’ fees in all court actions brought by either of them against the other or in which they are both plaintiffs or defendants, and also in court actions involving offsetting claims between Subcontractor and Contractor, because of any doubts, disputes or actions arising out of this Subcontract, except in the following cases:

“(a) When Subcontractor obtains a favorable net judgment against Contractor, after consideration of claims and offsets of Contractor which are allowed by the court against Subcontractor, for breach of this Subcontract;

“(b) When Contractor is denied a favorable judgment by a court in any suit against Subcontractor which may be brought by Contractor.”

In this action Permanente is plaintiff and cross-defendant and Birnie is defendant and cross-complainant, and this action involves offsetting claims between Permanente and Birnie under VS-14.

26. Permanente employed as its attorneys to

represent it in this action Messrs. Bruce Walkup and Willis S. Slusser, and the firm of Thelen, Marrin, Johnson & Bridges. Said attorneys performed extensive services in connection with said action covering a period of time commencing in August, 1945, and continuing to the present time. \$15,000.00 is a reasonable sum to be awarded to Permanente as its attorneys' fees pursuant to said Article 29 of VS-14.

27. Said VS-14 contained a Term and Condition designated as Article 23, which provided as follows:

“Bond: If required by this Subcontract, as indicated on the face of this Subcontract, Subcontractor (Birnie) agrees to furnish two separate bonds, one for ‘Performance’ coverage in the amount of 50% of the Subcontract compensation, and the other for ‘Payment’ coverage in the amount of 50% of the Subcontract compensation, the two together being equal to 100% of the Subcontract compensation. The latest revision of Government Standard Form 25 (‘Performance’) and Form 25-A (‘Payment’) shall be used, and the bonds shall be issued by a bonding company on the approved list of the Treasury Department (Form 356). The United States Maritime Commission as well as the Contractor (Permanente) shall be named as Obligee on the bonds. Such bonds shall be executed and delivered to the Contractor before any work is commenced under this Subcontract. Subcontractor shall pay and solely bear the cost of all premiums on such bonds.”

Said VS-14 contained a further provision which specified that such bonds referred to in said Article 23 were required under VS-14.

28. On VS-14 Birnie agreed to furnish Permanente and the Commission, as their interests may appear, a Performance Bond of the kind described in Finding of Fact 27, and which would guarantee, among other things, Birnie's performance of his obligations under Special Provision No. 4 and under Article 29 of VS-14.

29. On or about July 31, 1944, and pursuant to the requirements of VS-14 and Article 23 thereof referred to in Findings of Fact 27, Birnie, as principal, and the Bonding Company, as surety, for a valuable consideration made, executed, and delivered to Permanente a Performance Bond on United States Standard Form No. 25 (Revised) (Construction or Supply), designated as No. C-28504, in the amount of \$44,048.45, which provided, in part, as follows:

"That we, Birnie Electric Company of 816 W. 5th Street, Los Angeles 13, California, as Principal, and Massachusetts Bonding and Insurance Company, a corporation established under the laws of the Commonwealth of Massachusetts and having its principal office in Boston in the said Commonwealth, as Surety, are held and firmly bound unto The Permanente Metals Corporation and the United States of America represented by the U. S. Maritime Commission as their interest may appear, in the penal sum of Forty-four Thousand Forty-eight & 45/100

(\$44,048.45) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

“The Condition of This Obligation Is Such, that whereas the principal entered into a certain contract, hereto attached, with The Permanente Metals Corporation, dated May 29, 1944, for installation of Degaussing System, Radar System, and all other work covered by Articles 1 to 5 inclusive on face of sub-contract (VS-14) on Hulls Nos. 552 to 556, inclusive, a total of five (5) vessels under Prime Contract No. MCc-15762.

“Now Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by The Permanente Metals Corporation, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.”

30. On or about August 28, 1944, and pursuant to

the requirements of VS-14 and Article 23 thereof referred to in Finding of Fact 27, Birnie, as principal, and the Bonding Company, as surety, for a valuable consideration, made, executed, and delivered to Permanente a Performance Bond in similar form to said Performance Bond No. C-28504, but which was designated as Performance Bond No. C-28589, and was in the amount of \$150,754.22 and related to work under Addendum No. 1 to VS-14 on Commission hulls Nos. 557 to 573 inclusive.

31. On or about October 31, 1944, and pursuant to the requirements of VS-14 and Article 23 thereof referred to in Finding of Fact 27, the Bonding Company for a valuable consideration made, executed, and delivered to Permanente an Endorsement to be attached to and form a part of said Performance Bond No. C-28504 and said Performance Bond No. C-28589, which Endorsement increased the amount of Performance Bonds No. C-28504 and No. C-28589 in the amount of \$25,000.00 under Addendum No. 1 to VS-14.

32. On or about November 9, 1944, and pursuant to the requirements of VS-14 and Article 23 thereof referred to in Finding of Fact 27, Birnie, as principal, and the Bonding Company, as surety, for a valuable consideration made, executed, and delivered to Permanente a Performance Bond in similar form to said Performance Bonds No. C-28504 and No. C-28589, but which was dated November 9, 1944, and was in the amount of \$87,566.38 and related to work under Addendum No. 2 to VS-14 on Commission hulls Nos. 552 to 573 inclusive.

33. Each of said Performance Bonds and said Endorsement referred to in Findings of Fact 29, 30, 31 and 32 has been at all times after its execution and delivery in full force and effect.

34. By the Performance Bonds and Endorsement referred to in Findings of Fact 29, 30, 31 and 32 the Bonding Company, as surety agreed to be liable, among other things, for the faithful performance by Birnie of his obligation under Special Provision No. 4 to repay said excess profits as determined by the Commission, and under Article 29 of VS-14 to pay attorneys' fees as provided in said Article 29.

35. An actual controversy and dispute has arisen between Permanente, on the one hand, and Birnie and the Bonding Company, on the other hand, under and out of VS-14 and said performance bond and endorsements. The controversy and dispute concern and involve the provisions of Special Provision No. 4 with respect to the repayment by Birnie to Permanente of excess profits realized by Birnie under VS-14 and the liability of the bonding company.

Permanente contends and asserts: (1) That Special Provision No. 4 of VS-14 is valid and in effect; and (2) That under and by virtue of the terms and conditions of said Performance Bonds and Endorsement the Bonding Company is jointly and severally liable with Birnie to account for and pay to Permanente the excess profits due under Special Provision No. 4 of VS-14.

Birnie and the Bonding Company contend and assert: (1) That said Prime Contract was negotiated, made, and executed as a part of the Emergency Naval Construction Program authorized by the

laws of the United States, among which were and are the Act of March 26, 1934 (48 Stat. 503, 34 U.S.C.A. 496) and the Act of October 8, 1940 (54 Stat. 1002, 34 U.S.C.A. 496 a) and that said Acts are applicable to VS-14; (2) That Special Provision No. 4 is void and without effect under and by virtue of Section 401 of Title IV of the Second Revenue Act of 1940 (54 Stat. 1003, 34 U.S.C.A. 496 a); (3) That without regard to the effectiveness and validity of the provisions of Special Provision No. 4, the terms and provisions of said Performance Bonds and Endorsement in no event require the Bonding Company to pay as surety any part of such excess profits under Special Provision No. 4 and that it was not the intention of any of the parties to the said Performance Bonds and Endorsement that the Bonding Company should be liable for the faithful performance by Birnie of Special Provision No. 4; (4) That VS-14 and said Prime Contract were and are contracts for the construction and manufacture of complete naval vessels or portions thereof, and were entered into in a taxable year to which the excess profits tax provided in Subchapter E of Chapter 2 of the United States Internal Revenue Code is applicable and would be applicable if Birnie were a corporation; (5) That Birnie and the Bonding Company, or either of them, are not obligated to pay to Permanente, or to the Commission through Permanente, any profits made by Birnie, in excess of 10% of the total contract price, or in any amount; and (6) That Permanente is indebted to Birnie in the sum of \$43,185.27 under VS-14.

36. Said Prime Contract was not negotiated, made, and executed as a part of the Emergency Naval Construction Program authorized by the laws of the United States, among which were and are the Act of March 26, 1934 (48 Stat. 503, 34 U.S.C.A. 496) and the Act of October 8, 1940 (54 Stat. 1003, 34 U.S.C.A. 496 a).

37. Said Prime Contract was not a contract for the construction and manufacture of complete naval vessels or portions thereof.

38. Said VS-14 was not a contract for the construction and manufacture of complete naval vessels or portions thereof.

39. Said Prime Contract was not a contract made with Permanente by the Secretary of the Navy, but was a contract made with Permanente by the Commission acting as an independent agency of the United States, and on its own behalf.

40. Said VS-14 was not a contract made with Birnie by the Secretary of the Navy, and was not a subcontract under a prime contract made with the Secretary of the Navy.

41. Said VS-14 and said Prime Contract were entered into in a taxable year to which the excess profits tax provided in Subchapter E of Chapter 2 of the United States Internal Revenue Code is applicable and would be applicable to Birnie if Birnie were a corporation.

42. Permanente and Birnie also entered into another subcontract under said Prime Contract, said subcontract being designated as Vessels Subcontract No. VS-28, hereinafter called "VS-28." Permanente became indebted to Birnie under said

VS-28 in the sum of \$34,687.59 and refused to pay said amount to Birnie, but instead held said amount as an offset against the amount which Permanente claimed to be due from Birnie under VS-14. Birnie made demand on Permanente for the payment of said sum of \$34,687.59 under VS-28 on or about April 4, 1947.

43. Permanente has agreed to pay to the Commission, as the sole property of the Commission, the net amount of any judgment in this action in favor of Permanente for the repayment of excess profits under Special Provision No. 4 of VS-14, and further to reimburse the Commission for attorneys' fees heretofore paid to Permanente by the Commission in the prosecution of this action to the extent that the judgment in favor of Permanente for attorneys' fees in this action is sufficient to cover such reimbursement.

44. During a period from approximately December 30, 1944, to March 31, 1945, in the Northern District of California, Permanente furnished to Birnie, at the special instance and request of Birnie and in connection with the performance of said VS-14 and VS-28, goods and services of the agreed and reasonable value of \$1,545.66. Permanente demanded payment from Birnie for said sum of \$1,545.66 on or before March 31, 1945, but Birnie has refused to pay any part of said sum to Permanente.

Conclusions of Law

1. This Court has jurisdiction of the subject of this action and of the parties to this action and should determine their respective rights and render

judgment to give effect to such determination.

2. Special Provision No. 4 of Subcontract VS-14 is valid and binding and is not rendered void or without effect because of Section 401 of Title IV of the Second Revenue Act of 1940 (54 Stat. 1003, 34 U.S.C.A. 496 a). Said Section 401 is inapplicable to Prime Contract No. MCc 15762 and to VS-14 and to said Special Provision No. 4. Likewise the Act of March 26, 1934 (48 Stat. 503, 34 U.S.C.A. 496) is inapplicable to said Prime Contract and to VS-14 and to said Special Provision No. 4. Said Prime Contract was not a contract with the Secretary of the Navy nor was it a contract for the construction or manufacture of any complete naval vessel or any portion thereof within the meaning and effect of said Acts. Said VS-14 was not a contract or subcontract with the Secretary of the Navy nor was it a contract or subcontract for the construction or manufacture of any complete naval vessel or any portion thereof within the meaning and effect of said Acts.

3. Permanente is not obligated to pay Birnie any amount under VS-14.

4. Birnie is obligated to pay to Permanente under VS-14 the sum of \$148,946.57, the amount of the excess profits realized by Birnie under VS-14 as determined by the Commission.

5. Birnie is not obligated to pay Permanente any amount under VS-28.

6. Permanente is obligated to pay to Birnie under VS-28 the sum of \$34,687.59.

7. Birnie is entitled to a credit of said sum of \$34,687.59 against said sum of \$148,946.57, leaving

a net balance due from Birnie to Permanente, after allowing for said credit, of \$114,258.98.

8. Said sum of \$114,258.98 should bear interest at the rate of 7% per annum from March 20, 1947, the date of demand, until paid.

9. Birnie is obligated to pay Permanente an attorneys' fee of \$15,000.00 under Article 29 of VS-14.

10. The effect of said Performance Bonds and Endorsement was to make the Bonding Company liable as surety, among other things, for the faithful performance by Birnie of his obligation to repay to Permanente excess profits as determined by the Commission under Special Provision No. 4. The reference in Special Provision No. 4 to Section 505 (b) of the Merchant Marine Act of 1936 was not intended to have and does not have the effect of exempting the Bonding Company from liability for the repayment of excess profits under Special Provision No. 4.

11. Birnie, as principal, and the Bonding Company, as surety, are jointly and severally liable under said Performance Bonds and Endorsement to pay to Permanente the sum of \$114,258.98 together with interest thereon at the rate of 7% per annum from March 20, 1947, until paid, and also to pay to Permanente said sum of \$15,000.00 for attorneys' fees.

12. Said sum of \$114,258.98 together with interest thereon at the rate of 7% per annum from March 20, 1947, until paid shall, when paid, be paid by Permanente to the Commission as the sole property of the Commission.

13. Permanente shall, upon payment of said

\$15,000.00 award for attorneys' fees, reimburse the Commission for attorneys' fees heretofore paid to Permanente by the Commission for services rendered on behalf of Permanente in the prosecution of this action to the extent that said \$15,000.00 for attorneys' fees is adequate for such purpose.

14. Birnie is obligated to pay to Permanente the sum of \$1,545.66 due for goods and services furnished to Birnie by Permanente.

15. Said sum of \$1,545.66 should bear interest at the rate of 7% per annum from March 31, 1945, the date of demand, until paid.

16. The Motion of the Bonding Company for Judgment on the Pleadings or in the Alternative for Summary Judgment should be denied.

17. The Commission is not obligated to pay Birnie any amount.

18. Permanente should have judgment for its costs of suit against Birnie and the Bonding Company.

19. The Commission should have judgment for its costs of suit against Birnie and the Bonding Company.

Let Judgment be entered accordingly.

Done in Open Court this 20th day of October, 1950.

/s/ DAL M. LEMMON,

United States District Judge.

Receipt of a copy admitted.

[Endorsed]: Filed Oct. 20, 1950.

In the United States District Court for the Northern District of California, Southern Division

No. 26215-L

THE PERMANENTE METALS CORPORATION, a Corporation,

Plaintiff,

vs.

JOHN URQUHART BIRNIE, etc., et al.,

Defendants.

JOHN URQUHART BIRNIE, etc., et al.,

Defendants and Cross-Complainants,

vs.

THE PERMANENTE METALS CORPORATION, a Corporation, et al.,

Plaintiffs and Cross-Defendants.

JUDGMENT

This case came on to be heard before the above-entitled court, Honorable Dal M. Lemmon, United States District Judge, presiding, February 21st and February 23rd, 1950, and evidence both oral and written was submitted, and the cause was thereafter briefed by counsel for the respective parties, and the Court having heretofore made its findings of fact and conclusions of law herein, and being fully advised in the premises, it is now Ordered, Adjudged and Decreed as follows:

1. That plaintiff, The Permanente Metals Corporation, have and recover from defendants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, the sum of One Hundred Fourteen Thousand Two Hundred Fifty-eight and 98/100 Dollars (\$114,258.98), together with interest thereon at the rate of seven per cent (7%) per annum from March 20, 1947.

2. That plaintiff, The Permanente Metals Corporation, have and recover from defendants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, the additional sum of Fifteen Thousand Dollars (\$15,000.00) as attorneys' fees.

3. That plaintiff, The Permanente Metals Corporation, have and recover from defendant, John Urquhart Birnie, the additional sum of One Thousand Five Hundred Forty-five and 66/100 Dollars (\$1,545.66), together with interest thereon at the rate of seven per cent (7%) per annum from March 31, 1945.

4. That plaintiff, The Permanente Metals Corporation, have judgment against defendants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, for its costs of suit incurred herein in the sum of Five Hundred Forty-four and 73/100 Dollars (\$544.73).

5. That cross-complainants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, take nothing by their cross-complaint herein against cross-defendants, The Permanente Metals Corporation and United States Maritime Commission.

6. That cross-defendant, United States Maritime Commission have judgement against cross-complainants, John Urquhart Birnie and Massachusetts Bonding and Insurance Company, for its costs of suit incurred herein in the sum of
..... (\$.....).

Done in Open Court this 20th day of October, 1950.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed Oct. 20, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that John Urquhart Birnie, an individual doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, a corporation, and each of them, defendants and cross-complainants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment

entered of record in the above-captioned action on the 23rd day of October, 1950.

HILL, FARRER & BURRILL,
MELLIN, HANSCOM &
HURSH,

By /s/ ELLIOTT H. PENTZ,
Attorneys for Defendant, Cross-Complainant and
Appellant, John Urquhart Birnie, etc.

CRIDER, RUNKLE & TILSON,

By /s/ CLARENCE B. RUNKLE,
Attorneys for Defendant, Cross-Complainant and
Appellant Massachusetts Bonding and Insurance
Company, a Corporation.

[Endorsed]: Filed Nov. 17, 1950.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, Massachusetts Bonding and Insurance Company, a Corporation, Defendant herein, has prosecuted or is about to prosecute an appeal to the United States Court of Appeals for the Ninth Circuit from a judgment made and entered October 20, 1950, by the District Court of the United States for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, the undersigned, Fidelity and Deposit Company of

Maryland, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of Massachusetts Bonding and Insurance Company, a corporation, Appellant, that they will prosecute their appeal to effect and answer all costs if they fail to make good their appeal, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount said Fidelity and Deposit Company of Maryland acknowledges itself justly bound.

And Further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above-entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action of suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

Signed, Sealed and Dated this 17th day of November, 1950.

FIDELITY AND DEPOSIT

COMPANY OF MARYLAND,

[Seal] By /s/ ERBON DELVENTHAL,

Attorney in Fact.

Attest

/s/ S. CLIMO,

Attesting Agent.

State of California,
City and County of San Francisco—ss.

On this 17th day of November, A.D. 1950, before me, Belle Jordan, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Erbon Delventhal, Attorney-in-Fact, and S. Climo, Agent, of the Fidelity and Deposit Company of Maryland, a corporation known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent respectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Seal] /s/ BELLE JORDAN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Nov. 9, 1952.

[Endorsed]: Filed Nov. 20, 1950.

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS ON
WHICH DEFENDANT, CROSS-COM-
PLAINANT AND APPELLANT, JOHN
URQUHART BIRNIE, AN INDIVIDUAL
DOING BUSINESS AS BIRNIE ELEC-
TRIC COMPANY, INTENDS TO RELY
ON APPEAL

Comes Now defendant, cross-complainant and appellant herein John Urquhart Birnie, an individual doing business as Birnie Electric Company, hereinafter called "Birnie," and makes the following concise statement of the points on which he intends to rely upon for appeal to the United States Circuit Court of Appeals from the final judgment made and entered October 23, 1950, in the above-entitled case:

1. The Court erred in finding that Contract MCc 15762, hereinafter called "the Prime Contract," between the cross-defendant United States Maritime Commission, hereinafter called "the Commission," and plaintiff, cross-defendant and appellee, The Permanente Metals Corporation, a corporation, hereinafter called "Permanente," was not negotiated, made and effected as a part of the Emergency Naval Construction Program authorized by the laws of the United States, among which were and are the Act of March 26, 1934 (48 Stat. 503, 34 USCA 496) and the Act of October 8, 1940 (54 Stat. 1003, 34 USCA 496a), in that said finding is contrary to the evidence.

2. The Court erred in finding that the Prime Contract was not a contract for the construction and manufacture of complete naval vessels or portions thereof, in said finding is contrary to the evidence.

3. The Court erred in finding that the subcontract between Permanente and Birnie, being designated as Vessels Subcontract No. VS-14, hereinafter called "VS-14," was not a contract or subcontract for the construction and manufacture of complete naval vessels or portions thereof, in that said finding is contrary to the evidence.

4. The Court erred in finding that the Prime Contract was a contract made by the Commission acting as an independent agency of the United States and on its own behalf, in that said finding is contrary to the evidence.

5. The Court erred in finding that Permanente has done and performed all acts and things required on its part to be done or performed under VS-14 and the addenda thereto, in that said finding is contrary to the evidence.

6. The Court erred in finding that said VS-14 was not a contract made with Birnie by the Secretary of the Navy, in that said finding is contrary to the evidence.

7. The Court erred in concluding as a matter of law that Special Provision No. 4 contained in VS-14, which provision is hereinafter called "Special Provision No. 4," is valid and binding and that said provision was not rendered invalid or void or without effect because of Section 401 of

Title IV of the Second Revenue Act of 1940 (54 Stat. 1003, 34 USCA 496a).

8. The Court erred in concluding as a matter of law that said Section 401 of Title IV of the Second Revenue Act of 1940 is inapplicable to the Prime Contract and to VS-14 and to Special Provision No. 4.

9. The Court erred in concluding as a matter of law that the Act of March 26, 1934 (48 Stat. 503, 34 USCA 496), was not applicable to the Prime Contract and to VS-14 and to Special Provision No. 4.

10. The Court erred in concluding as a matter of law that the Prime Contract was not a contract for the construction or manufacture of any complete naval vessels or any portions thereof within the meaning and effect of the aforesaid acts.

11. The Court erred in concluding as a matter of law that VS-14 was not a contract or subcontract for the construction or manufacture of any complete naval vessel or any portions thereof within the meaning and effect of the aforesaid acts.

12. The Court erred in concluding as a matter of law that Permanente is not obligated to pay Birnie any amount under VS-14.

13. The Court erred in concluding as a matter of law that Birnie is obligated to pay to Permanente under VS-14 the sum of \$148,946.57, or any amount.

14. The Court erred in concluding as a matter of law that Birnie is obligated to pay Permanente attorneys' fees of \$15,000.00, or any amount, under Article 29 of VS-14.

15. The Court erred in concluding as a matter of law that Birnie, as the principal, is severally liable or jointly liable with the defendant, cross-complainant and appellant Massachusetts Bonding and Insurance Company, a corporation, under any performance bonds or endorsements thereto to pay to Permanente the sum of \$114,258.98, or the sum of \$15,000.00 for attorneys' fees, or any sums whatsoever.

16. The Court erred in concluding as a matter of law that Permanente should have judgment for its costs of suit against Birnie.

17. The Court erred in concluding as a matter of law that the Commission should have judgment for its costs of suit against Birnie.

18. The Court erred in not granting the relief as prayed for in the answer of Birnie to the first amended complaint, the cross-complaint and counterclaim of Birnie.

Dated: November 28, 1950.

HILL, FARRER & BURRILL,
By /s/ ELLIOT H. PENTZ,
MELLIN, HANSCOM &
HERSH,

By /s/ OSCAR A. MELLIN,
Attorneys for Defendant, Cross-Complainant and
Appellant John Urquhart Birnie, an Individ-
ual Doing Business as Birnie Electric Com-
pany.

Receipt of Copy acknowledged.

[Endorsed]: Filed Dec. 4, 1950.

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS ON
WHICH DEFENDANT, CROSS-COM-
PLAINANT AND APPELLANT, MASSA-
CHUSETTS BONDING AND INSURANCE
COMPANY, A CORPORATION, INTENDS
TO RELY ON APPEAL

Comes Now defendant, cross-complainant and appellant herein, Massachusetts Bonding and Insurance Company, a corporation, hereinafter called "the Bonding Company," and makes the following concise statement of the points on which it intends to rely upon for appeal to the United States Court of Appeals from the final judgment made and entered October 23, 1950, in the above-entitled cause:

1. The Court erred in finding that Contract MCc 15762, hereinafter called "the Prime Contract," between the cross-defendant United States Maritime Commission, hereinafter called "the Commission," and plaintiff, cross-defendant and appellee, The Permanente Metals Corporation, a corporation, hereinafter called "Permanente," was not negotiated, made and effected as a part of the Emergency Naval Construction Program authorized by the laws of the United States, among which were and are the Act of March 26, 1934 (48 Stat. 503, 34 USCA 496), and the Act of October 8, 1940 (54 Stat. 1003, 34 USCA 496a), in that said finding is contrary to the evidence.

2. The Court erred in finding that the Prime

Contract was not a contract for the construction and manufacture of complete naval vessels or portions thereof, in that said finding is contrary to the evidence.

3. The Court erred in finding that the subcontract between Permanente and defendant, cross-complainant and appellant John Urquhart Birnie, an individual doing business as Birnie Electric Company, hereinafter called "Birnie," being designated as Vessels Subcontract No. VS-14, hereinafter called "VS-14," was not a contract or subcontract for the construction and manufacture of complete naval vessels or portions thereof, in that said finding is contrary to the evidence.

4. The Court erred in finding that the Prime Contract was a contract made by the Commission acting as an independent agency of the United States and on its own behalf, in that said finding is contrary to the evidence.

5. The Court erred in finding that Permanente has done and performed all acts and things required on its part to be done or performed under VS-14 and the addenda thereto, in that said finding is contrary to the evidence.

6. The Court erred in finding that said VS-14 was not a contract made with Birnie by the Secretary of the Navy, in that said finding is contrary to the evidence.

7. The Court erred in finding that by the performance bonds and endorsements thereto made, executed and delivered by the Massachusetts Bonding and Insurance Company, hereinafter called the

“Bonding Company,” to Permanente, the Bonding Company, as surety, agreed to be liable for the faithful performance by Birnie of his obligation under Special Provision No. 4 contained in VS-14, which provision is hereinafter called “Special Provision No. 4,” to repay the excess profits as determined by the Commission, or any excess profits, and in finding that under Article 29 of VS-14 the Bonding Company agreed to be liable to pay attorneys’ fees as provided in said Article 29, in that said finding is contrary to the evidence.

8. The Court erred in concluding as a matter of law that Special Provision No. 4 is valid and binding and that said provision was not rendered invalid or void or without effect because of Section 401 of Title IV of the Second Revenue Act of 1940 (54 Stat. 1003, 34 USCA 496a).

9. The Court erred in concluding as a matter of law that said Section 401 of Title IV of the Second Revenue Act of 1940 is inapplicable to the Prime Contract and to VS-14 and to Special Provision No. 4.

10. The Court erred in concluding as a matter of law that the Act of March 26, 1934 (48 Stat. 503, 34 USCA 496) was not applicable to the Prime Contract and to VS-14 and to Special Provision No. 4.

11. The Court erred in concluding as a matter of law that the Prime Contract was not a contract for the construction or manufacture of any complete naval vessels or any portions thereof within the meaning and effect of the aforesaid acts.

12. The Court erred in concluding as a matter of law that VS-14 was not a contract or subcontract for the construction or manufacture of any complete naval vessel or any portions thereof within the meaning and effect of the aforesaid acts.

13. The Court erred in concluding as a matter of law that Permanente is not obligated to pay Birnie any amount under VS-14.

14. The Court erred in concluding as a matter of law that Birnie is obligated to pay to Permanente under VS-14 the sum of \$148,946.57, or any amount.

15. The Court erred in concluding as a matter of law that Birnie is obligated to pay Permanente attorneys' fees of \$15,000.00, or any amount, under Article 29 of VS-14.

16. The Court erred in concluding as a matter of law that the performance bonds and endorsements thereto issued by the Bonding Company, or the effect of said performance bonds and endorsements thereto, made the Bonding Company liable as a surety, or otherwise, for the faithful performance by Birnie of his obligation to repay to Permanente excess profits as determined by the Commission under Special Provision No. 4, or otherwise determined.

17. The Court erred in concluding as a matter of law that the reference in Special Provision No. 4 to Section 505(b) of the Merchant Marine Act of 1936 was not intended to have and does not have the effect of exempting the Bonding Company from liability for the repayment of excess profits under Special Provision No. 4 of VS-14.

18. The Court erred in concluding as a matter of law that Birnie, as principal, and the Bonding Company, as surety, are jointly and severally liable under said performance bonds and endorsements to pay to Permanente the sum of \$114,258.98, together with interest thereon at the rate of seven per cent (7%) per annum from March 20, 1947, until paid, or any sum, or any rate of interest, or to pay to Permanente the sum of \$15,000.00 for attorneys' fees, or any sum whatsoever.

19. The Court erred in concluding as a matter of law that Permanente should have judgment for its costs of suit against the Bonding Company.

20. The Court erred in concluding as a matter of law that the Commission should have judgment for its costs of suit against the Bonding Company.

21. The Court erred in not granting the relief as prayed for in the answer of the Bonding Company to the first amended complaint, the cross-complaint and counterclaim of the Bonding Company.

Dated: November 28, 1950.

CRIDER, RUNKLE & TILSON,

By /s/ CLARENCE B. RUNKLE,

Attorneys for Defendant, Cross-Complainant and Appellant Massachusetts Bonding and Insurance Company, a Corporation.

Receipt of Copy acknowledged.

[Endorsed]: Filed Dec. 4, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Comes Now John Urquhart Birnie, an individual doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, a corporation, and each of them, and hereby designates the contents of record on appeal as follows:

1. Complaint.
2. Answer to Complaint.
3. First Amended Complaint.
4. Answer to First Amended Complaint, Cross-Complaint and Counterclaim.
5. Answer of plaintiff, The Permanente Metals Corporation, a corporation, to Cross-Complaint and Counterclaim.
6. Answer of cross-defendant, United States Maritime Commission, to Counterclaim and Cross-Complaint.
7. Reporter's transcript of proceedings and testimony taken on February 21, 1950, and February 23, 1950, being pages 1 through 168, inclusive, of said transcript.
8. Plaintiff's and cross-defendants' exhibits A through RR, inclusive.
9. Defendants' and cross-complainants' exhibits 1 through 15, inclusive.

10. Deposition of Ivan Joyce Wanless taken on behalf of plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, on October 3, 1947, together with all exhibits, other than exhibit HH, to said deposition.

11. Deposition of John Bassette Maher taken on behalf of plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, on October 1, 1947, together with all exhibits, other than exhibits V, W, X, Y, Z, AA, BB, CC, DD, EE and GG, to said deposition.

12. Deposition of R. L. McDonald, Assistant Secretary of the Maritime Commission, taken on behalf of plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, on October 1, 1947, together with all exhibits, other than exhibits A, B, C, D, G, K, L, P, S and T to said deposition.

13. Findings of Fact and Conclusions of Law.

14. Final Judgment entered herein on October 23, 1950.

15. Notice of Appeal.

16. Bond on Appeal.

17. Concise statement by defendant, cross-complainant and appellant, John Urquhart Birnie, an individual doing business as Birnie Electric Company, of points on which said defendant, cross-complainant and appellant intends to rely on appeal.

18. Concise statement by defendant, cross-com-

plainant and appellant, Massachusetts Bonding and Insurance Company, a corporation, of points on which said defendant, cross-complainant and appellant intends to rely on appeal.

19. This Designation of Contents of Record on Appeal.

Dated this 28th day of November, 1950.

HILL, FARRER & BURRILL,

By /s/ ELLIOTT H. PENTZ,
MELLIN, HANSCOM &
HURSH,

By /s/ OSCAR A. MELLIN,

Attorneys for Defendant, Cross-Complainant and Appellant John Urquhart Birnie, an Individual Doing Business as Birnie Electric Company.

CRIDER, RUNKLE & TILSON,

By /s/ CLARENCE B. RUNKLE,

Attorneys for Defendant, Cross-Complainant and Appellant Massachusetts Bonding and Insurance Company, a Corporation.

Receipt of Copy acknowledged.

[Endorsed]: Filed Dec. 4, 1950.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

The Permanente Metals Corporation, a corporation, hereby makes its designation of contents of

record on appeal in addition to those items numbered 1 through 19 designated by appellants in their Designation of Contents of Record on Appeal, as follows:

1. Reporter's Transcript of Pre-Trial Conference taken January 4, 1949, pages 1 to 22, inclusive.
2. Appellee's Designation of Contents of Record on Appeal.

Dated: December 14, 1950.

BRUCE WALKUP,
WILLIS S. SLUSSER,
THELEN, MARRIN, JOHNSON
& BRIDGES,

By /s/ BRUCE WALKUP,
Attorneys for Plaintiff, Cross-Defendant, and Appellee, The Permanente Metals Corporation.

Receipt of Copy acknowledged.

[Endorsed]: Filed Dec. 14, 1950.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 26215-L

THE PERMANENTE METALS CORPORATION, a Corporation,

Plaintiff,

vs.

JOHN URQUHART BIRNIE, etc., et al.,

Defendants.

JOHN URQUHART BIRNIE, etc., et al.,

Defendants and Cross-Complainants,

vs.

THE PERMANENTE METALS CORPORATION, a Corporation, et al.,

Plaintiffs and Cross-Defendants.

Before: Hon. Dal M. Lemmon,
Judge.

Appearances:

For Plaintiff and Cross-Defendant Permanente
Metals Corporation:

BRUCE WALKUP, ESQ.,
111 Sutter Street,
San Francisco 4, California.

For Defendants and Cross-Complainants John
Urquhart Birnie, etc., et al.:

ELLIOTT H. PENTZ, ESQ.,
HILL, MORGAN & FARRER,
1007 Title Guarantee Bldg.,
Los Angeles 13, California.

JACK E. HURSH, ESQ.,
MELLIN AND HANSCOM
395 Sutter Street,
San Francisco, California.

For United States Maritime Commission:

C. ELMER COLLETT, ESQ.,
Assistant United States Attorney.

REPORTER'S TRANSCRIPT OF
PRE-TRIAL CONFERENCE

Tuesday, January 4, 1949

The Clerk: Permanente Metals Corporation vs.
Birnie.

Mr. Hursh: May it please the Court, may I introduce Elliott H. Pentz, a lawyer of the Los Angeles Bar, for admission to this Court for the purpose of the trial of this case.

The Court: Very well.

Mr. Walkup: Your Honor, in this matter I represent the plaintiff Permanente Metals Corporation; Mr. Pentz represents the defendant and cross-complainant Birnie Electric Company, and Massachusetts Bonding Indemnity Company; Mr. Collett represents the United States Maritime Commission.

This case has been pending now for a long time and we have made an effort out of court to get together on the admissibility of certain evidence, official documents of the [2*] Government, correspondence between the parties and so forth, and I believe we have now reached a stipulation that will eliminate a great deal of time at the trial. Mr. Pentz has a stipulation prepared here which is satisfactory to me on that subject, and I do not know whether it is satisfactory to the United States Attorney or not.

Mr. Collett: Is it something that was——

(A document was exhibited to Mr. Collett.)

Mr. Collett: That is agreeable.

Mr. Walkup: Now this particular stipulation, your Honor, refers to the use of copies of documents attached to the depositions on file, waiving objections to the foundation being laid and the fact they are copies and not originals. There are also other documents, such as correspondence between the parties and correspondence between the Maritime Commission and the parties, which we have discussed, and the genuineness is admitted and the use of copies is agreeable on that, isn't it, Mr. Pentz?

Mr. Pentz: Yes, that is true.

The Court: There are no further requests for admissions that counsel have in mind?

Mr. Walkup: Yes, your Honor, I have this point in mind: We have pleaded in our complaint that Permanente has duly and regularly performed all of its obligations under the contract. That is denied in general terms, and I believe we are [3] entitled at the pre-trial conference to have counsel for the

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

defendant and cross-complainant specify in what particulars we have not performed.

The Court: I think you are entitled to that.

Mr. Pentz: The same thing applies in reverse, your Honor.

Mr. Walkup: Right.

Mr. Pentz: I can state in our case the extent to which we are very willing to concede on that point, and counsel and I have discussed it informally, we each think along the same line. I am prepared to stipulate that the Permanente Metals Corporation has fully and faithfully performed the terms of the sub-contracts which are the subject matter of this suit with the exception of paying the balance on the sub-contract price that we claim in this litigation. On the other hand I would expect Mr. Walkup to acknowledge that Mr. Birnie, my client, has fully and faithfully performed his obligations under the same sub-contract, everything he was supposed to do with the exception of the two items, one as to paying to the Permanente Metals Corporation as the property of the Maritime Commission certain alleged over-payments of price, which is the nub of their complaint, moneys which are alleged were unlawfully retained as being excess profits. As I say, your Honor, that is the nub of our entire lawsuit.

And the second point I am willing to concede is that Mr. [4] Birnie did not report costs and profits as required by special provision No. 4 of the sub-contract.

I think it is understood between the two of us that each party has done what they are supposed to do

with the exception of Mr. Birnie reporting costs under special provision No. 4.

I have a statement to make about that VS-28. If you have something to add, go ahead.

Mr. Walkup: I am willing to concede on behalf of Permanente Metals Corporation that Mr. Birnie fully performed his obligations under these sub-contracts in question except he failed to return to Permanente for the benefit of the Maritime Commission the excess profits that he made under the contract, and furthermore in that connection that he failed to file with the Maritime Commission his reports under oath as required by the sub-contract setting forth his costs and the profits he realized under the contract.

The Court: That substantially is the same statement as the statement made by opposing counsel.

Mr. Walkup: Yes. In other words, we are willing to admit that Birnie performed with the exception of the obligations as to excess profits.

Mr. Pentz: We admit they did everything except give us the money we are suing for.

The Court: I assume, Mr. Collett, you agree? I assume [5] you are agreeing to these stipulations unless you except to them.

Mr. Collett: As your Honor will recall, there was a motion to dismiss the Maritime Commission that was filed in this matter some time ago, and rather extensive briefs were filed, and I believe as time goes on your Honor will see the point in that case, that the Maritime Commission is not properly a party in that suit and the matter is founded on an alleged contract and involves over ten thousand

dollars and the Court properly does not have jurisdiction. This is a matter between Birnie and Permanente on this sub-contract and should be ironed out between the two of them and the matter submitted to your Honor on that basis. That the Maritime Commission is still in there is a matter that I think that may be properly again presented to your Honor when the case comes to trial in the way of a motion to dismiss as to the Maritime Commission.

Mr. Pentz: Well, the Court, of course, has ruled that at least so far they are necessary parties.

Now I have one more statement to make if you have exhausted that subject. It requires a brief preliminary statement for the Court, I believe, to understand what I am going to state.

There was a prime contract here between Permanente Metals and the Maritime Commission to build a number of vessels. [6] Permanente Metals and my client entered into a subcontract for the installation of certain equipment on a number of those vessels. It is our position that the sub-contracts—rather, it is our position that VS-14, one of the sub-contracts—there are two, VS-14 and VS-28—it is our position that VS-14 qualifies under the Vinson-Trammell Act, and that the undertaking to pay profits in excess of 10 per cent of the stated contract price back is of no effect, that is our contention, that is on the fundamental basis that this was a contract for the manufacture of Navy vessels.

Now when I filed my answer and cross-complaint, since most of the facts were in the possession of the Navy and the Maritime Commission, I didn't know at that time that the vessels covered by VS-28 would

not really qualify as Navy vessels. I did not acquire that information until later in the litigation.

Now I think it is fair to the parties and the Court that I should state that where I sue for the balance of the stated contract price in VS-28, that I wish to acquaint all parties that I abandon any recovery on VS-28 in excess of what the Permanente Metals acknowledge they owe us as an offset on that contract. In other words, in VS-28 they have some \$34,000 which they in their answer to my cross-complaint acknowledge to be due. To the extent of keeping that offset there I naturally will stand on my cross-complaint on VS-28, but I am [7] not seeking any more than they acknowledge to be due on that contract.

Now I will add one more statement—I don't know how much time your Honor wishes to devote to a pre-trial conference, but I will state this, that in regard to the bonding company's claimed liability on VS-14, it is our position that under no conceivable view of this case is there any liability whatsoever, and that fact is a matter of law that is revealed by the pleadings.

If your Honor wishes to hear that matter I would be very happy to make a motion for summary judgment——

The Court: I have a jury trial on at 10:30 and some other matters. Could those legal questions be briefed for the assistance and guidance of the Court in the trial of the case?

Mr. Pentz: Very easily.

Mr. Walkup: Yes, that can be done.

The Court: Getting back to the factual problems, are there any further admissions or requests for stipulations that counsel have in mind?

Mr. Walkup: No, your Honor, I think not; but under—there is another matter that we might take up at this pretrial conference. Under Rule 16, subdivision 2, of the Federal Rules of Civil Procedure, the Court at the pre-trial conference can allow amendments of the pleadings, and I would [8] like to amend the pleadings on their face, if the Court please, in two particulars. The first has merely to do with a correction of a mathematical computation which appears on page 6, line 3, of the answer of Permanente to the cross-complaint. At that place I would like to substitute \$34,687.59 for the figure which appears there of \$35,065.63. That is a correction in a mathematical computation which was recently discovered.

The Court: No objection to that?

Mr. Pentz: None, because I have one to ask for.

Mr. Walkup: And the same substitution should appear on line 4, page 6, of the answer of Permanente to the counter-claim and cross-complaint.

The Court: Same substitution of figures?

Mr. Walkup: Yes. It is just on the following line.

Now the next amendment I would request the Court to approve would be to amend the title to the complaint. I believe the title is merely surplussage any way, but I designated the complaint as a complaint for damages for breach of contract. Actually what it is is a complaint for payment of money.

I don't want to be bound by the designation of the complaint as a complaint for damages of breach of contract when actually, as the prayer indicates, we are merely asking for the payment of certain money rather than damages, and I ask that the title of the first amended complaint be amended to read, [9] "First Amended Complaint for Payment of Money Due, and against the Principal and Surety Upon Contract Performance Bond."

The Court: I see no objection to that.

Mr. Pentz: None.

Mr. Walkup: Now the third amendment which I would like to request would be that on the second cause of action the United States Maritime Commission, which is already before the Court, be joined as a party defendant. That cause of action is a complaint by Permanente Metals Corporation against Birnie Electric Company and the Massachusetts Bonding & Indemnity Company on the performance bond which the indemnity company gave to guarantee performance by Birnie on the subcontracts.

Now those bonds run in favor of Permanente Metals Corporation and the Maritime Commission Metals Corporation and the Maritime Commission as their interests may appear. The Maritime Commission was not joined as one of the parties sued on that for two reasons: first we felt that the Court did not have jurisdiction over the Maritime Commission; secondly, we felt that from the contracts that the obligation of Birnie was to pay to Permanente and not the Maritime Commission. The contract so states.

However, objection has been raised by the defendants; so that their interests may be fully adjudicated they would like the bonding company and the Government both before the Court so that their obligation to pay would be fully determined. [10]

Now since the Government in the Maritime Commission is already before the Court, I can see no objection to us at this time joining them as a defendant to the cause of action on the performance bonds.

I understand from Mr. Collett that is agreeable to him subject to the basic objection that the Maritime Commission should not be here at all.

The Court: Well, the permission is granted to amend in that particular without prejudice to your right to raise this same point by motion or otherwise at the trial of the case.

Mr. Walkup: Now would it be the wish of the Court that I file an amended pleading or merely file an amendment to that cause of action joining the Government.

The Court: You may merely file an amendment.

Mr. Walkup: Now there is one other point on the admission of documents which I have already discussed with Mr. Pentz. I have certified by the Maritime Commission a number of delivery certificates for vessels which were delivered. The Maritime Commission in Washington is unable to locate one of the delivery receipts. That accounts for the fact that one of them is not certified. However, to avoid the necessity of bringing witnesses here, Mr. Pentz has agreed that this certificate for Hull No.

527 can be included in the number of [11] certificates which are certified by the Commission. Is that agreeable?

Mr. Pentz: That is agreeable.

The Court: You had better identify it.

Mr. Walkup: Certificate of delivery of vessel, Hull No. 527, your Honor. It covers delivery from Permanente Metals to the Maritime Commission only as do all the other delivery certificates.

I believe that Mr. Pentz's statement and what transpired here this morning covers all the other points I had in mind, and the motion for production of documents which is also on the calendar has been satisfied by the delivery of the documents by Mr. Pentz out of court.

Mr. Pentz: I would ask for permission to amend my answer and cross-complaint to correct some arithmetic errors.

On page 6, line 26, should appear the figures \$432,604.83 rather than \$432,688.50.

On line 30 of the same page the figures should appear \$43,185.27 rather than \$43,268.94.

On page 15, line 16, is the same change, namely, \$432,604.83 in lieu of \$432,688.50.

And on line 11 on page 15 the figures should be \$43,185.27 in lieu of \$43,268.94. The same latter change to be carried through on line 20 of page 15; the figures should be \$43,185.27 in lieu of \$43,268.94, and the identical change [12] that I have last mentioned to be made on line 20 should also be made on line 23 of page 15.

On page 17—I will withdraw that remark.

Your Honor, I want it understood in my cause of action on this VS-28 I am not going to try to prove a case on that beyond what they acknowledge to be due, so I don't believe it is necessary for me to go ahead and make those changes, since it is understood.

Mr. Walkup: It can be made at the time of the trial so far as that is concerned.

The Court: Well, as long as counsel understand each other, why not make these changes in the pleadings?

Mr. Pentz: That is agreeable.

Mr. Walkup: That is entirely agreeable with us.

Mr. Pentz: The only remaining thing I can comment on is the attitude of the Court in regard to a matter of procedure. I intend to make a motion for a summary judgment in so far as the Massachusetts Bonding Company. I can make the motion now, it is rather brief, or if the Court——

The Court: I am going to ask counsel submit a memorandum on the legal problems that will arise in the trial of the case, and you might submit that in the same memorandum.

Mr. Pentz: Should I make a formal motion?

The Court: It would be well to do that, and include that in your memorandums, and in so far as counsel are agreeable [13] on the facts, they can be contained in those memorandums, I take it.

Mr. Pentz: Our difficulty is, we are in agreement on the basic documents and the letters and the memoranda, all of which we are ready to introduce subject to certain objections, but when we go much further we are agreeing on legal conclusions, which is rather

difficult. There will be many questions on the admissibility of these documents. There is no contention that they do not exist or they are not genuine, but there will be a serious contention they are not relevant.

The Court: You can discuss those in the memorandums you file in so far as you can foresee them.

Mr. Pentz: There is such a great multitude of them I am afraid we might tend toward confusion.

The Court: Can't they be grouped, separate into groups?

Mr. Walkup: Your Honor, maybe a brief explanation from me may clarify the point. Birnie contends that these excess profits limitations in the contracts are invalid because of the Vinson-Trammell Act, which is in the United States Code. It is a limitation upon excess profits provisions in contracts made with the Secretary of the Navy for the construction of Naval vessels, or portions thereof.

Now our contention is that the contracts were not with the Secretary of Navy but were with the United States Maritime Commission and that the Vinson-Trammell has absolutely no [14] application to contracts of this kind. If these were contracts which Mr. Birnie entered into with the Secretary of the Navy for construction of or outfitting of a vessel in a Navy yard, as many contractors do, we would not be permitted to include in the contract the limitations on excess profits. However, these particular contracts were entered into under public laws relating to the Maritime Commission. The prime contract was between Permanente and the Maritime

Commission, and the subcontract was between Birnie and Permanente, but under the Maritime Commission setup was not a sub-contract which would come under the Vinson-Trammell Act.

Now that is our complete position, and we feel as a matter of law without any evidence, just from reading the documents and studying the statutes, the Court should conclude that this is not within the scope of the Vinson-Trammell Act.

Now Birnie's position, as I understand, is, at least in part, that these vessels which were constructed had certain Naval features in them; that they were basically Maritime Commission Victory ships which were converted and had guns put on them and other features of a Naval nature, and after Permanente delivered them to the Maritime Commission the Maritime Commission turned them over to the Navy and the Navy did use them as transports.

We concede the facts as will appear from documents and [15] from the evidence that after Permanente concluded its contract and delivered them to the Maritime Commission the Maritime Commission entered into certain arrangements with the Navy whereby the Maritime Commission transferred these vessels, on a basis which will appear, to the Navy for use in the war effort and later to be returned to the Maritime Commission, but we contend that would not make them Navy vessels within the meaning of the statute which embodies the Vinson-Trammell Act, that that still would not make them vessels

constructed for the Secretary of Navy under contract with him.

The Court: Can you agree upon the facts so that you can present a question of law upon that feature of the case?

Mr. Walkup: I believe that we can.

The Court: And if I rule on that prior to the trial of the case that will simplify the problem as to the documents.

Mr. Pentz: I would suggest that since it is our position that this voluminous correspondence between the Navy and the Maritime Commission was such as to constitute the Maritime Commission in effect as agent for the Navy, in accordance with the statutory authority that the Maritime Commission can be such an agent, that whatever the Maritime Commission did in regard to these twenty-two vessels under VS-14 it was doing on behalf of the Secretary of Navy just as much as though the Secretary of the Navy had signed the contract, and I think perhaps Mr. Walkup and I, since the letters and memoranda between [16] the two agencies are so vital, that probably what we should do is to perhaps group them—we acknowledge they are genuine, we acknowledge they exist, and the copies are here, but I think perhaps we should get together and group them into groups and put them in logical sequence, which they are not in in the deposition, from which your Honor by reading them could get a chronological story of the course of events and make them simple, because that will be the nub of the case as far as the Birnie Company.

So far as the bonding company, I don't think under any conceivable ground they are liable.

I think if we could group that correspondence in some logical sequence that we would be of assistance to the Court.

Mr. Walkup: I am just wondering, your Honor, if maybe the logical way of doing this would not be for Permanente Metals to make a statement of its position, then have that answered by the defendants, let them state their position, and then give Permanente a chance to answer that, because if we write briefs which are filed coincidentally we won't be able to do that.

The Court: Well, I think that is what should be done.

Mr. Walkup: How much time?

Mr. Pentz: Is it counsel's suggestion this be simply a statement of position?

The Court: I want you to go further than that, I want you [17] to state not only your position, but the legal basis for that position, and in the reference to that state your position and the background of it.

Mr. Pentz: May I ask the Court what we could do with regard to the presentation to your Honor of this copious correspondence?

The Court: I think possibly you should file the first memorandum setting forth what your suggestions are in the way of grouping the documents, as you say, chronologically as they fall into groups, and then if you will please develop the position you take on the law standpoint, and then that can be answered by Permanente and you can reply.

Mr. Pentz: Fine.

The Court: If I need anything further from counsel I will call upon you.

Mr. Pentz: May we give our version—for example, we have letter so and so; this would seem to be of help to the Court, if we sort of paraphrased its contents.

The Court: Yes, I think so. How much time would you want to do this?

Mr. Pentz: Am I to present the first memorandum, your Honor?

The Court: Yes.

Mr. Pentz: Well, I would like to have three weeks.

The Court: Three weeks? [18]

Mr. Pentz: Three weeks.

The Court: Very well. Three weeks for you.

Mr. Walkup: That is satisfactory.

The Court: And how long to reply, two weeks?

Mr. Pentz: That will be satisfactory.

The Court: And then after those have been filed and I consider them, then I can put it on the calendar for setting. I don't want to set it now because it will go so far in the future. I know you gentlemen want some definite date, and after I rule on those matters I think probably we can set it, say, four weeks in advance for a date that is acceptable to counsel.

Mr. Walkup: I think by the time we have filed these briefs and your Honor has considered them, that the trial will probably not last more than a half day or a day at the most.

Mr. Pentz: Well, a half day is pretty short, but I think one day or two.

Mr. Collett: Your Honor, on behalf of Maritime Commission, which is still in there, we will endeavor to reply within the time that the Permanente Metals replies.

The Court: Very well.

Mr. Pentz: Shall we file this stipulation at this time, your Honor.

(Thereupon the Court took up some other matters.) [19]

(The following proceedings were had in chambers.)

The Court: This is a stipulation in the Permanente Metals vs. Birnie case. Now you may state it.

Mr. Walkup: In the second cause of action in the first amended complaint Permanente sues Birnie Electric Company and the Massachusetts Indemnity Company on the performance bonds, and Mr. Pentz has raised the question as to what would happen as to any moneys which Permanente received either from Mr. Birnie or the bonding company; that is, whether Permanente would keep that money or whether Permanente is obligated to pay that over to the Maritime Commission, and I have agreed to stipulate that any money that Permanente may recover in this action against either Birnie or the bonding company Permanente is bound by contract to pay and will pay to the United States Maritime Commission as the sole property of the Maritime Commission, subject to any existing offsetting credits between Permanente and the Maritime Com-

mission. That relates to the principal sum for excess profits.

We have also asked in our complaint for an award for attorney's fees if Permanente prevails in the case. That is covered under one general provision of the contract.

Now as to attorney's fees, I believe that that would also go to the Government to reimburse the Government for attorney's fees previously paid, but I don't know the extent of what attorney's fees have been paid by the Maritime Commission through [20] Permanente to us as counsel, but to the extent at least that the Government has already paid through Permanente as attorney's fees to us, the Government would be entitled to be repaid any attorney's fees if the Court so awards, but as to the entire principal sum that Permanente might recover would be in turn paid or credited by it to the Maritime Commission.

Does that cover that, Mr. Pentz?

Mr. Pentz: Yes, with one correction I would like to make; not an implication, Mr. Walkup, but I believe it was you that raised the question as to whom any recoverable money from the bonding company should go, because I am hard put to see how the bonding company is going to be liable any way, but rather than to go through the mechanics of getting the commission in as a party, as Mr. Walkup requested in open court, it was agreeable with me that there be no objection made to their absence as a party to the second cause of action upon condition that Mr. Walkup would stipulate

to what he has just read, which was that any money that Permanente may recover in this action against Birnie or the bonding company, that Permanente is bound by contract to pay and will pay to the Maritime Commission as the sole property of the Maritime Commission, subject to any existing Maritime Commission off-setting credits.

Mr. Walkup: That is agreeable. Then that will avoid, your Honor, the necessity of Permanente bringing in the [21] Maritime Commission as a party on the second cause of action in the first amended complaint, and no objection will be made to its absence.

Mr. Pentz: That is correct.

Mr. Collett: And I believe that probably obviates the necessity of having the Maritime Commission in there at all as far as your point of view is concerned.

Mr. Pentz: That is not true, because if the Maritime Commission is out of this litigation as a party we would argue strenuously that any damages had would be nominal, at the most one dollar. Now if you wish to get out that is your privilege, but we will certainly press that point. As a matter of fact, we resisted your motion to get out because of the fact that we did want—we would have that point at the time of the trial, and if we sat here and not objected to your motion to get out of the case, then when we came to trial we would probably be estopped from raising the point that their absence would affect damages.

The Court: That covers it, doesn't it?

Mr. Pentz: Yes, your Honor.

Mr. Walkup: Yes, your Honor.

The Court: All right. [22]

Certificate of Reporter

I, Clarence F. Wright, Official Reporter, certify that the foregoing 23 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ CLARENCE F. WRIGHT.

[Endorsed]: Filed Mar. 16, 1949.

In the District Court of the United States for the
Southern Division of California, Northern Dis-
trict

No. 26215-S.L.

THE PERMANENTE METALS CORPORA-
TION, a Corporation,

Plaintiff,

vs.

JOHN URQUHART BIRNIE, an Individual
Doing Business as BIRNIE ELECTRIC
COMPANY; MASSACHUSETTS BONDING
AND INSURANCE COMPANY, a Corpora-
tion, et al.,

Defendants.

JOHN URQUHART BIRNIE, an Individual
Doing Business as BIRNIE ELECTRIC
COMPANY, and MASSACHUSETTS BOND-
ING AND INSURANCE COMPANY, a Cor-
poration,

Defendants and Cross-Complainants,

vs.

THE PERMANENTE METALS CORPORA-
TION, a Corporation; UNITED STATES
MARITIME COMMISSION, and JOSEPH K.
CARSON, RAYMOND S. McKEOUGH,
ADMIRAL WILLIAM W. SMITH, GRAN-
VILLE MELLON and RICHARD PARK-
HURST, as Members of United States Maritime
Commission,

Plaintiff and Cross-Defendants.

Before: Hon. Dal M. Lemmon, Judge.

Appearances:

For Plaintiff and Cross-Defendant, The Permanente Metals Corporation, a Corporation:

BRUCE WALKUP, ESQ.,
111 Sutter Street,
San Francisco, Calif.

For United States Maritime Commission:

C. ELMER COLLETT, ESQ.,
Asst. U. S. Attorney,
Post Office Building,
San Francisco, Calif.

For Defendants and Cross-Complainants:

ELLIOTT PENTZ, ESQ.,
411 West Fifth Street,
Los Angeles, Calif. and

OSCAR A. MELLIN, ESQ.,
391 Sutter Street,
San Francisco, Calif.

REPORTER'S TRANSCRIPT

Tuesday, February 21, 1950, 2:00 P.M.

The Clerk: Number 26215, Permanente Metals vs. Birnie, for trial, motion for judgment on pleadings.

Mr. Walkup: Ready, your Honor.

Mr. Pentz: Ready, your Honor.

The Court: Are there any suggestions that counsel can make in the way of stipulations and requests for admissions that might boil these issues down?

Mr. Pentz: None that I know of, your Honor.

Mr. Walkup: Your Honor, I have prepared for the convenience of the Court, and have served counsel with the trial memorandum as to contested issues which are raised by the First Amended Complaint.

This case has been pending a long while and there have been certain stipulations entered into. There has been a pretrial conference, and there was at least one stipulation entered into during a deposition. So that it now appears that most of the issues of the first amended complaint are admitted in one form or another, and I have, for the convenience of the Court, taken each paragraph of the First Amended Complaint and stated what is admitted by the answer or admitted by a stipulation at the pretrial conference, or in some other manner so as to narrow the matter down to the few remaining disputed issues.

The Court: Can you tell me what those remaining issues [4*] are?

Mr. Walkup: I believe I can, your Honor, as far as the first amended complaint goes. The first paragraph is denied that Permanente Metals Corporation is a Delaware Corporation.

Mr. Pentz: Oh, yes, we will admit that at this time, your Honor.

Mr. Walkup: Your Honor might desire to follow the memorandum which I have prepared.

The second paragraph is partially admitted, but it

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

is denied that Mr. Birnie was doing business in the Northern District of California at the time the complaint was filed.

I have no way of proving that one way or the other, and I don't think it is material. The Court has jurisdiction in any event, so I think that is now immaterial.

The third paragraph is admitted.

The fourth paragraph—there is a denial on information and belief as to the status of the fictitious defendants. I now move the Court to dismiss the complaint as to all of the fictitious defendants.

The Court: That motion is granted.

Mr. Walkup: Paragraphs 5 through 9 are admitted.

Paragraph 10, although originally denied in the pleadings, was admitted at the pre-trial conference to this extent: It was admitted that Permanente has fully and faithfully done and performed all acts and things required to be done and performed by it under contract VS-14, except that Permanente [5] has not paid the balance of the contract price required by Birnie to be paid——

The Court: That goes right to the essence of this——

Mr. Walkup: That is correct. ——but as far as performance by Birnie, there is now an admission that it has been performed.

Paragraph 11, it is admitted that Contract VS-14 contained the special provision number 4, which is the special provision in controversy, but it is denied that the legal effect of that provision is as we plead it.

The Court: Now you may proceed.

Mr. Walkup: It is further admitted under Paragraph 11 that Birnie did not make report under oath to the Maritime Commission in care of Permanente upon the completion of contract VS-14 as required by special provision number 4. That was admitted in two manners—by failure to deny a request for admission which was made by Permanente, and also admitted by the pre-trial conference as shown in the transcript of the pre-trial conference.

I might state on that point, your Honor, that subdivision 4 of this contract VS-14 required at the end of the work Mr. Birnie file a report under oath to the Maritime Commission setting forth certain information upon which a determination of excess profits could be based.

That is material in view of the regulations of the [6] Commission for the determination of excess profits which provide that in the event of failure of an individual to file such reports a determination can be made, and I will introduce those regulations in evidence, but that is the importance of that particular feature of the case.

Paragraph 12 is denied as to the first paragraph, which has to do with the making by the Commission of the determination of profits, subject to recapture. However, it is admitted that after the Commission notified Birnie that it had made such a determination, Birnie did not thereafter, within thirty days from the date of receipt of the letter, request a hearing before the Commission with respect to the

determination as to the excess profits. The Commission's notice to Mr. Birnie, which is referred to, stated that a determination had been made and that he had thirty days to demand a hearing, if dissatisfied.

He has denied that the determination was properly made, or that the Commission had authority to make the determination, but he has admitted that he was notified of the determination and failed to request a hearing within the thirty days allowed.

Under Paragraph 13 it is admitted that Permanente paid Birnie the total sum of \$389,419.56, but it is denied that that was a payment in excess of the amount due.

Under Paragraph 14 it is admitted a demand for payment has been made by Permanente, and that Birnie has refused to [7] make the payment, but denied that any balance is owing.

Now, I believe, your Honor, that the evidence which I desire to introduce under that first cause of action either is all covered by stipulation or can be very briefly.

I propose to offer in evidence certain contracts, certain cancelled checks showing payments, showing the date of payments and other matters which I believe can be introduced in about fifteen minutes in a very orderly fashion by stipulation of counsel.

Speaking first as to the first cause of action, the first exhibit which I propose to offer is the prime contract between the United States Maritime Commission and Permanente Metals Corporation dated April 22, 1943. It is contract number MCo-15762. By the request for admission, it has already been

stated that this is a true and correct copy of the contract.

The Court: Any objection to this?

Mr. Pentz: No objection whatsoever, your Honor.

The Court: It will be received, then, as the Plaintiff's first in order.

The Clerk: Plaintiff's Exhibit 1.

Mr. Mellin: If your Honor please, there are already letters on the Plaintiff's Exhibits in the deposition. The numbers are on the defendants' exhibits. May they keep that order?

The Court: Very well. [8]

Mr. Walkup: This will be A, then.

(The document referred to was marked Plaintiff's Exhibit A.)

Mr. Walkup: The next exhibit I propose to offer, your Honor, is Addendum Number 1 of the contract introduced as Exhibit A, a photostatic copy likewise.

Mr. Pentz: No objection, your Honor.

The Court: What number did it take in the deposition?

Mr. Walkup: These were not introduced in the deposition, your Honor.

Mr. Pentz: They were in the request for admissions. That happens to be Exhibit E in our first request for admissions.

Mr. Walkup: I think it would probably be more orderly to start off with A, B, and C, then we can relate back to the deposition numbers elsewhere.

The Court: I suppose as to Exhibit Number B

referred to in the deposition, your suggestion for an orderly introduction of these would be interfered with if this came in as Plaintiff's Exhibit B?

Mr. Pentz: I have no objection to the order actually, I am not trying to make any objection to it, but that would be true, that would not correspond precisely to the designation in the deposition.

Mr. Walkup: Whatever the Court desires. [9]

The Court: I think counsel might agree what numbers they want to give to these. You gentlemen have gone into this far deeper than I have.

Mr. Mellin: If your Honor please, could it go in as Exhibit B, and let the record show it is Exhibit E in the deposition?

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit B.)

Mr. Walkup: The next exhibit I propose to offer, your Honor, is Addendum Number 2 to the same contract. It is also a photostatic copy of the original.

Mr. Mellin: May the record also show that is Exhibit E in the request for admissions, your Honor?

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit C.)

Mr. Walkup: The next exhibit that I propose to offer, your Honor, is Addendum Number 3 to the same contract, a photostatic copy likewise, Addendum 3 to the same contract.

(The document referred to was marked Plaintiff's Exhibit D.)

Mr. Pentz: May the record show that Plaintiff's

D is found in Mr. Walkup's answer to our request for admissions as an exhibit thereto? [10]

The Court: Yes.

Mr. Walkup: The next exhibit that I propose to offer, your Honor, is Addendum Number 4 to the same contract. This was also referred to in Permanente's answer to request for admissions by Birnie.

(The document referred to was marked Plaintiff's Exhibit E.)

Mr. Walkup: The next exhibit that I propose to offer, your Honor, is a prime contract between United States Maritime Commission and Permanente Metals Corporation, dated April 1st, 1945, and designated as contract number MCo-36452.

I would like to state in this connection that the reason for introducing this is that it is referred to in Addendum 3 to the previous contract, and this contract takes over certain of the functions which originally were in issue under the previous contract, so that in order to have the complete picture it is necessary to have this contract, together with the contract introduced as Plaintiff's Exhibit A.

Mr. Pentz: That is correct.

(The document referred to was marked Plaintiff's Exhibit F.)

The Court: I will interrupt at this point.

(The Court thereupon took up another matter.)

The Court: Now, you may proceed.

Mr. Walkup: The next exhibit I propose to offer,

your [11] Honor, is Addendum Number 1 to Contract MCc-36452, the contract which was just introduced.

(The document referred to was marked Plaintiff's Exhibit G.)

Mr. Walkup: The next contract which I propose to introduce, your Honor, I am not certain that Counsel is familiar with, it is contract number MCc-41503, and it is referred to in Addendum Number 4 to Exhibit A, and it is also referred to in Addendum 1 to Contract MCc-36452.

I will state that the purpose for introducing this contract is to demonstrate that any money which is collected by Permanente Metals in this case must be paid by Permanente Metals to the United States Maritime Commission.

Mr. Pentz: We have already stipulated to that, haven't we, Mr. Walkup?

Mr. Walkup: We have so stipulated, and this contract which is referred to in the exhibits previously introduced expresses that in contract form.

Mr. Pentz: If that is the purpose—I have never seen the contract and I don't know what it states, but I have no objection, if it is limited to that purpose, because I have already stipulated to that.

Mr. Walkup: That is the purpose.

The Court: What is to be gained by fortifying the stipulation? [12]

Mr. Walkup: I am not certain if there is anything to be gained, your Honor. The issue has been raised in argument in this case that Permanente will not be damaged if it does not collect this money from

Birnie. Now, this contract requires us to pay the money over to——

The Court: Yes, so stipulated by opposing counsel.

Mr. Walkup: I think this contract would assist in establishing the fact that we have an obligation to pay that, and, therefore, we would be hurt if we were not entitled to receive the money. However, if the stipulation covers that point, I have no desire to clutter up the record.

Mr. Pentz: Well, I precisely so stipulated, and I am quite sure, I can assure Mr. Walkup, that we are not going to advance the type of claim he seems to be concerned about.

Mr. Walkup: With that stipulation, then, I withdraw my offer of Contract Number MCc-41513.

The next document which I propose to offer is the original of the Vessels Sub-Contract Number VS-14. This is referred to in the pleadings, and the copy in the pleadings is admitted to be a true copy, but I think it might be agreeable to the Court to have the actual original contract in evidence.

Mr. Pentz: No objection.

(The document referred to was marked Plaintiff's Exhibit H.)

Mr. Walkup: I offer as the next exhibit in order [13] Addendum Number 1 to Sub-Contract Number VS-14, which is also the original Addendum Number 1 to the Sub-Contract.

(The document referred to was marked Plaintiff's Exhibit I.)

Mr. Walkup: I next offer the original Addendum Number 2 to Sub-Contract Number VS-14.

(The document referred to was marked Plaintiff's Exhibit J.)

Mr. Walkup: I next offer the original Addendum Number 3 to Sub-Contract Number VS-14.

(The document referred to was marked Plaintiff's Exhibit K.)

Mr. Walkup: Now, with reference to Paragraph 12 of the First Amended Complaint, I offer at this time a certified copy of Resolution of United States Maritime Commission at a meeting held February 25, 1947, which is the determination by the Commission of the excess profits subject to recapture under Sub-Contract VS-14.

Mr. Pentz: We have already stipulated to that, haven't we, Mr. Walkup? I have a copy in my file and it has been stipulated to as to the determination of the profits.

Mr. Walkup: In other words, I am——

Mr. Pentz: If I am incorrect in that, I would like to be advised, but I have a copy of the stipulation before me.

Mr. Walkup: We had a stipulation a long time ago which [14] is not executed——

Mr. Pentz: I am willing to execute it now. There is nothing here I am not willing to stipulate to. I don't know why it wasn't signed.

Mr. Walkup: At any event, I have here a certified copy which I will offer in evidence as Plaintiff's Exhibit next in order.

(The document referred to was marked Plaintiff's Exhibit L.)

Mr. Walkup: And, further, in connection with Paragraph 12 of the First Amended Complaint, I offer in evidence a certified copy of the regulations of the United States Maritime Commission, prescribing method of determining profit. This is referred to in Sub-Contract VS-14.

Mr. Pentz: Just a second. No objection.

(The document referred to was marked Plaintiff's Exhibit M.)

Mr. Mellin: If your Honor please, at this time I would like to ask counsel, through the Court, whether or not it is not determined between the parties or it can be stipulated the precise amount involved so that we might eliminate a lot of time——

The Court: I was going to bring that up.

Mr. Walkup: Yes, your Honor. I am quite sure we can.

Mr. Mellin: Then we could eliminate, perhaps, some of [15] this record, because I am certain there is no issue as to the amount.

Mr. Walkup: I agree, your Honor, and I have notes of those amounts which I can cover in just a moment. I have about two more exhibits to offer. I next offer, your Honor, a certified copy of a letter from the Maritime Commission to Birnie Electric Company, dated March 3, 1947. That is included under one certification with another letter of March 27, 1947, but I only offer the first letter, that is the letter of March 3, 1947, at this time.

Mr. Pentz: No objection.

(The document referred to was marked Plaintiff's Exhibit N.)

Mr. Walkup: Now, at this time, your Honor, I have proposed to offer the cancelled checks from Permanente Metals Corporation to Birnie Electric Company totaling \$389,419.56. However, that total amount is admitted having been paid in the pleadings, and my only purpose in offering the checks is to show the dates of payment, and possibly we can stipulate the dates appearing on the checks as the dates of payment. The total amount paid is admitted.

Mr. Mellin: It would seem to me it would be wholly immaterial, your Honor.

Mr. Walkup: It wouldn't be immaterial on the question of interest running on the amount. We made a demand for payment subsequently, but I want to show before we made the [16] demand for payment the money was paid to Birnie and we have demanded back a portion at a later date.

Mr. Birnie: Your Honor, the question of \$389,000 pleaded in the pleadings or the time of the payment of the various amounts is completely immaterial. The date of interest would run——

The Court: From the demand for repayment.

Mr. Mellin: From the demand for repayment and the determination of the Maritime Commission, and that would not be fixed by the checks, it would be fixed by the resolution. The dates on the checks would be immaterial.

Mr. Walkup: I will accept the stipulation this money was paid before the demand for payment.

Mr. Mellin: There is no question about that.

The Court: That is the only matter of proof?

Mr. Walkup: That is the only point I had, your Honor.

Now, as to the demand for repayment, I offer in evidence at this time a copy of a letter dated March 20, 1947, addressed to John Urquhart Birnie, doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, from Thelen, Marrin, Johnson and Bridges. I believe we had a stipulation in Mr. Birnie's deposition that this copy could be used in lieu of the original.

Mr. Pentz: That is correct.

(The document referred to was marked Plaintiff's Exhibit O.) [17]

Mr. Walkup: Now, as to the amount, your Honor, the present amount that Permanente is suing for in the first amended complaint under the first cause of action, that is \$148,946.57. The same amount is demanded against the bonding company under the second cause of action, and under the third cause of action there is a demand against Birnie alone for \$1,545.66.

Permanente admits that it owes to Birnie under a separate contract and is holding as an offset the sum of \$34,687.59.

Will you gentlemen correct me if I am wrong on the figures?

Mr. Pentz: Just a moment. We will accept it subject to a check at a later time. That sounds right.

Mr. Walkup: Now, Birnie has cross-complained

against Permanente and the Maritime Commission, and the amount now sought is \$43,185.27 under Contract VS-14. Birnie also claims \$34,687.59 under the other contract, VS-28. That is the same \$34,687.59 which we admit we are holding as an offset.

Now, as to the small item of \$1,545.66, it is admitted——

The Court: Is there something you want to take up in this case?

(The Court thereupon took up another matter.)

Mr. Walkup: I was stating, your Honor, that as to the amount of \$1,545.66, which is the amount prayed for in the third cause of action and not related to contract, but merely [18] for goods and services rendered, it is admitted by Birnie that he received the goods and services in that amount.

Mr. Pentz: That is correct.

Mr. Walkup: Now, subject to checking those figures again tonight, your Honor, I believe that they are the correct figures of the amount now in dispute.

Mr. Pentz: Yes, I believe that is correct, Mr. Walkup.

Just to make it clear, we are abandoning any affirmative steps under this other sub-contract VS-28 except to the extent that there is a set-off owed us, and our issues, then, have to do only with VS-14.

Mr. Walkup: Yes. There was originally a claim of \$113,377.79, by Birnie against Permanente and the United States Maritime Commission under VS-28.

Mr. Pentz: Yes. The abandonment just now mentioned was fully contained in our pre-trial conference. It was abandoned at that time.

Mr. Walkup: Now, under the second cause of action, your Honor, there is an incorporation by reference of Paragraphs 1 to 14 of the first cause of action, following which there are Paragraphs 2, 3, 4, and 5 which set forth that certain performance bonds, and I have the original performance bonds, which I desire to offer in evidence under the Second Cause of Action.

Mr. Pentz: At this time, your Honor, I feel it is timely, [19] so as to keep our record from becoming over-voluminous, that my motion for judgment so far as the bonding company on the pleadings or in the alternative for summary judgment might be heard at this time, because I believe that as a bare matter of law there can be no conceivable liability against the bonding company. Perhaps this is an opportune time to hear that motion, rather than to get these bonds in the record.

The Court: Well, can't you make a motion that all of the issues be considered at the end of the case?

Mr. Pentz: Well, I can only answer that this way, that insofar as Mr. Birnie is concerned there is only one issue, and that is that subdivision Number 4, but whether Birnie wins or loses on that we still feel that even if he loses that there is no liability against the bonding company as a matter of law.

The Court: I understand your position on that,

but I would like to consider all these issues together.

Mr. Pentz: Very well.

Mr. Walkup: Then I offer at this time performance bond dated July 31, 1944, one of the executed originals.

(The document referred to was marked Plaintiff's Exhibit P.)

Mr. Pentz: These are just the bonds that were pleaded, are they, Mr. Walkup?

Mr. Walkup: Yes. These were pleaded under the second cause of action. [20]

Mr. Pentz: Very well, no objection.

Mr. Walkup: I offer next performance bond dated August 28, 1944, one of the original executed copies.

(The document referred to was marked Plaintiff's Exhibit Q.)

Mr. Walkup: I offer next an endorsement to the foregoing two bonds dated October 31, 1944, executed as an original.

(The document referred to was marked Plaintiff's Exhibit R.)

Mr. Walkup: I offer next an undated performance bond—correction, it is dated November 9, 1944, and this is also one of the executed originals.

(The document referred to was marked Plaintiff's Exhibit S.)

Mr. Walkup: Now, in view of the stipulations and the exhibits going in without the necessity of

witnesses to identify them, your Honor, the only testimony that I have to offer on the case in chief relates to the question of attorneys' fees. There is a provision in the Contract VS-14—this is Article 29—which provides as follows:

“And sub-contractor”—which is Birnie—
“hereby agrees to pay to contractor a reasonable sum as attorneys' fees in all court actions brought by either of them against the other, or in which they are both [21] plaintiffs or defendants, and also in court actions involving off-setting claims between sub-contractor and contractor, because of any jobs, disputes, or actions arising out of this sub-contract, except in the following cases:

“(a) When sub-contractor obtains a favorable net judgment against contractor after consideration of claims and off-sets of contractor which are allowed by the court against sub-contractor, for breach of this sub-contract;

“(b) When contractor is denied a favorable judgment by a court in any suit against sub-contractor which may be brought by contractor.”

I might state in passing that it is the position of Permanente, as set forth in the memorandum of authorities in opposition to the motion for judgment on the pleadings, that the bonding company insures in addition to other things the liability on the part of Birnie to pay reasonable attorneys' fees, if awarded, so that entirely irrespective of the point

under excess profits, by contract if the court awards the Permanente's attorneys' fees, the bonding company which insures all the obligations of the contract would insure that as well, and in this case the attorneys' fees could be a special item.

Mr. Mellin: If your Honor please, at this point may I ask Mr. Walkup through the court whether or not it is Mr. [22] Walkup's position that that provision for attorneys' fees runs also to the benefit of the Maritime Commission.

Mr. Walkup: Yes, and I will stipulate, your Honor, that any attorneys' fees awarded——

Mr. Mellin: I think you misunderstand me. I mean do you contend—not that the fees will go to the Maritime Commission, but the contractual obligation of Birnie to Permanente for contract fees for the benefit of the Maritime Commission——

Mr. Walkup: Yes.

Mr. Mellin: ——the third party beneficiary——

Mr. Walkup: That is correct. As I was going to say, any attorneys' fees awarded up to the extent of the fees that have been paid to us as attorneys for Permanente by the Maritime Commission would be refunded then to the Maritime Commission, and I so stipulate, and that can be a binding admission in the record.

Mr. Mellin: I don't wish to stipulate anything, your Honor, I was just wondering what his position was. We only contracted with respect to attorneys' fees with Permanente, not with the Maritime Commission. This is a sub-contract, so we are going to contend that any fees paid by the Maritime Com-

mission must be deducted in the event they are allowed from any fees by Permanente.

Mr. Walkup: At this time, your Honor, I would like to be sworn to testify on the issue of attorneys' fees. [23]

BRUCE WALKUP

called for the Plaintiff, sworn.

Direct Examination

By Mr. Walkup:

I would like to ask counsel, through the Court, if it would be all right if I adopt the narrative form of testimony, and if there are objections to the testimony I will stipulate to it being stricken pending objection.

Mr. Mellin: That is satisfactory.

The Witness: Your Honor, I am an attorney, duly licensed to practice in the State of California, admitted to the Supreme Court of the State of California in 1938, a graduate of the Bolt Hall of Law, University of California. I practiced with Donohue, Rogers and Hamlin in Oakland as an associate from 1938 to 1942, and thereafter with the firm of Thelen, Marrin, Johnson, and Bridges, in San Francisco, as an associate from 1942 to 1947.

I am a member of the bar of the United States District Court for the Northern District of California, and for the Southern District of California.

I was admitted to practice before the United States Supreme Court in 1945. I was admitted to practice before the United States Tax Court, Treasury Department, in 1946.

(Testimony of Bruce Walkup.)

My experience has been largely in trial work with the two firms where I have been associated.

In 1947 I opened my own law offices in San Francisco, and [24] have continued my own law offices for some two years now. However, I have continued to handle litigation for Thelen, Marrin, Johnson, and Bridges in my own office.

I have had considerable experience with the fixing of attorneys' fees with both firms where I have been associated, and in the last two years in my own law offices.

With Thelen, Marrin, Johnson, and Bridges I have handled many cases arising under shipyard contracts. Thelen, Marrin, Johnson and Bridges represented the various shipyards in the Bay area, also in Washington and Oregon and in Southern California during the war, and considerable litigation arose out of those contracts, which I have handled in the Federal and State courts.

Thelen, Marrin, Johnson and Bridges, have a fee arrangement with the United States Maritime Commission whereby that firm is compensated on an hourly basis for all litigated cases at the rate of \$20.00 an hour for any services performed by any partner in the firm or by any associate of the firm in connection with the cases. That arrangement was entered into originally with California Shipbuilding Corporation and accepted by the Maritime Commission in about 1945, and has continued in effect ever since. That is the fee basis between

(Testimony of Bruce Walkup.)

Thelen, Marrin, Johnson, and Bridges and the Maritime Commission approved for these particular cases.

I am personally familiar with the amount of time that [25] has been spent to date in connection with this action by the partners and associates of Thelen, Marrin, Johnson, and Bridges, and it is the practice in that firm to keep all the time sheets, which are kept by each employee and partner in the firm. The time sheets are quite extensive and relate to this as well as other matters for Permanente Metals Corporation extending over in this case a period from August, 1945, to date.

I have had a summary prepared of the hours spent in connection with the particular litigation by the various members of the firm from August, 1945, to January 1st, 1950, and the time amounts to approximately 650 hours. The work included two trips to Washington, D. C.; the first to work with the Maritime Commission in developing the facts involved under the original set of pleadings; the second trip—the first trip, I might state, was from January 15 to February 1st, 1947. A considerable time was spent in checking through the various government records and with the Maritime and Navy Departments to try to develop the facts which were then in issue under the pleadings. A second trip to Washington, D. C., was required for depositions which were noticed by both sides to the litigation, at which time depositions of certain Navy officers were taken and certain Maritime Commission offi-

(Testimony of Bruce Walkup.)

cials. Those depositions were originally scheduled for September 24, 1947, and did not start on the date they were originally scheduled, and were prolonged over at least one week-end, with the result that [26] I was in Washington for the depositions and preparation for the depositions from approximately September 19, 1947, returning to San Francisco on October 4, 1947. Counsel for Mr. Birnie were present at that time in Washington.

There was also involved one trip to Los Angeles to take the deposition of Mr. Birnie, which I believe was completed in one day.

There was extensive work done by various members of the Thelen firm on authorities both before the action was filed and subsequently, the principal legal point involved was the effect of the Vinson-Trammell Act, and that point was researched in great particularity, and because the action has been pending for some four or five years, the research had to be checked and brought up to date from time to time.

There was also research necessary in connection with the liability of the bonding company, and there was considerable research done on a number of other subsidiary points which arose under the original set of pleadings.

Originally, I might state, by the first complaint filed it was charged that this provision for the recapture of excess profits was inserted in the contract by mistake of fact, mistake of law, and I believe by misrepresentation by Permanente Metals

(Testimony of Bruce Walkup.)

Corporation, and it was necessary to research those points, and in addition to investigate the facts surrounding the execution of the contract. [27]

The research consumed some time and the investigation of facts consumed considerable time, because at that time many of the witnesses had left the shipyard and had to be located at other places.

Much of the investigation was conducted either by correspondence or by long distance telephone, and we chased many witness who, when we finally located them, were not helpful as to the facts.

Now, that particular phase of the case; that is, the misrepresentation, the mistake of fact and mistake of law in the execution of VS-14 was abandoned.

The case also involved inquiry under contract VS-28, and the same type of work had to be done with regard to VS-28 as was done with regard to VS-14, but on the investigation different parties were involved to some extent on VS-28.

In addition to research and authorities work and investigation, there were numerous conferences held, sometimes with representatives of the Birnie Electric Company, sometimes among the various members of the Thelen, Marrin, Johnson, and Bridges firm who were working on the case; in addition to that there were numerous court appearances over the period of several years, for setting the case for trial on occasions when it was on the calendar to be set, or on some other motion which required court attendance.

(Testimony of Bruce Walkup.)

The case was actually set for trial on, I believe, two [28] or three prior occasions, and on each occasion considerable work was done in preparation for the trial, each time on a somewhat different set of facts, a different set of contested issues, so that to that extent there has been a considerable duplication of effort in preparing the case for trial on several different occasions.

Now, in addition there was a pre-trial conference, and prior to the pre-trial conference rather detailed requests for admissions were served by both sides. Some of the requests for admissions required my spending, I believe, some two or three days in Richmond, searching the stored records with the custodian of records, attempting to find some of the information which was requested by the opposing counsel, so that that was a rather extended task getting together information for the requests for admissions.

At the time of the pre-trial conference, your Honor requested that the case be briefed by counsel, and rather extensive printed briefs were filed. I believe the brief for Permanente Metals was some fifty-two pages in length, discussing the facts and the applicable law. That work consumed considerable time and is a part of the total hours referred to.

It is my opinion, based upon the—strike that, please. I might state, as was just brought out, that originally there was a complaint for some \$70,000 against Permanente under [29] sub-contract VS-28,

(Testimony of Bruce Walkup.)

which has now been abandoned as to approximately one-half, so that to that extent of the services performed by Thelen, Marrin, Johnson and Bridges, they resulted in a saving of some \$35,000 as against the amount originally contended for by Birnie Electric Company. The amount originally in dispute in this case, when you consider the complaint by Birnie on the one hand and the off-setting cross-complaint by—the complaint by Permanente and the off-setting cross-complaint by Birnie amounted to a net difference of approximately \$262,000. Permanente was suing for One Hundred and Fifty Thousand odd dollars, and Birnie was originally cross-complaining for \$111,832, so that with the net difference of Two Hundred and Sixty odd thousand dollars involved the case was handled on a very thorough basis, both on questions of fact and questions of law.

It is my opinion, based upon the amounts involved in this action, the responsibility involved, the time involved in all of these matters which I have detailed, and assuming a favorable result, because unless there is a favorable result we are not entitled to any attorneys' fees in any event, that a reasonable attorneys' fee to be allowed in this case, assuming a successful result, would be \$25,000, covering work to date, plus anticipated future work before the case is finally concluded, and, as previously stated, any such fee awarded would be credited to the Maritime Commission to the [30] extent of fees previously billed and paid.

(Testimony of Bruce Walkup.)

Cross-Examination

By Mr. Mellin:

Q. Now, your opinion as to the reasonable value of the services are one hundred per cent greater than the Maritime Commission actually agreed to pay, is that a fact? Six hundred and fifty hours I have it at \$20.00 an hour is \$13,000.

A. That is up to January 1, 1950.

Q. I see.

A. I neglected to state there has been considerable work since January 1st to the trial date, and I believe I stated at the end of my testimony that that would include anticipated future work.

Mr. Mellin: You think the trial will be about two days?

A. I have in mind the possibility of appeals by either side.

Q. But wouldn't you say that \$20.00 an hour would be a reasonable fee?

A. Yes, I believe that \$20.00 an hour would be a reasonable fee for work to date, and if we knew definitely what amount of hours was to be consumed in the future, plus what has been consumed between January 1, 1950, to date, and add it all up, that would be a reasonable fee.

Q. Now, you recall that there was litigation between the same parties in the Southern District entitled *Birnie versus Permanente*? [31]

A. Yes, I do.

(Testimony of Bruce Walkup.)

Q. Does this 650 hours take into consideration the work that was done there?

A. No, it doesn't. I very carefully kept separate records on the two actions, and in preparing the summary which I referred to, which arrived at the total of some 650 hours, eliminated every item referring to the Southern District action. I believe there may be about two hours included in the total of 650 which are improperly charged and should be charged to the Southern District action.

Q. Now, how much of this service has been paid for heretofore directly by the Maritime Commission?

A. The method of payment is Permanente—Thelen, Marrin, Johnson, and Bridges bills Permanente Metals Corporation. Permanente Metals Corporation pays Thelen, Marrin, Johnson and Bridges and then requests reimbursement by the Maritime Commission. It is my understanding that all of the hours billed to Permanente have been paid to Thelen, Marrin, Johnson and Bridges by Permanente, and in turn reimbursed to Permanente Metals by the Maritime Commission.

Q. At the rate of \$20.00 an hour?

A. Yes.

Q. So actually your firm or yourself have been paid by the Maritime Commission through Permanente?

A. That is correct. [32]

Q. Now, on these trips to Washington, Mr. Walkup, you also had other matters of the Mari-

(Testimony of Bruce Walkup.)

time Commission to take up in Washington at that time, didn't you?

A. I believe I did. On such occasions the time charged to this case was only the hours actually spent, and on travelling the time was pro rated among the various cases.

Q. That is what I wanted to ask you. That was true on both of these trips to Washington?

A. That is correct. I believe the records were kept as to each case, and the time traveling would be pro rated to the various matters.

Q. How many days have you assumed it is going to take, assuming appeal, from now on in this case, Mr. Walkup?

A. Well, I don't think that it is possible for me to estimate that, there are so many intangibles. It would depend on whether there was an appeal to the Circuit Court or Supreme Court, how extensive the briefs were, whether or not it is necessary to go to Washington, D. C.,—

Q. So your additional \$12,000 estimated fee was based purely on guess?

A. Speculation, I would say, rather than guess.
Mr. Mellin: That is all.

(Recess.)

The Clerk: Number 26215, Permanente Metals vs. Birnie.

Mr. Walkup: Under the third cause of action, your Honor, [33] with reference to the admitted liability of \$1545.66 for goods and services fur-

nished, I would like to offer in evidence at this time an itemized invoice showing the dates that those goods and services were rendered, which was some five years ago, with reference to the question of interest, or possibly to save cluttering up the record counsel could stipulate that all the services were rendered between December 30, 1944 and March 31, 1945, as shown by the invoices?

Mr. Mellin: So stipulated.

Mr. Walkup: At this time, your Honor, the plaintiff rests.

Opening Statement on Behalf of the Defendants and Cross-Complainants

Mr. Pentz: Your Honor please, this law suit has only two issues: The first issue as to the legal effect of special provision 4 of VS-14; the second issue is as to whether or not the bonding company is liable, no matter who prevails, insofar as the first issue is concerned.

The evidence that we will propose to offer will show a situation posed by the Navy in this war which was distinct and different from the type of situation that had theretofore been any type of military problems, and that was the matter of [34] transports.

The type of vessel which is the subject matter here was designed for a particular naval objective, and that is the type of vessel which is known in Naval parlance as an ANA—that is, Naval Personnel Attack.

The early type of vessel also was designed for a particular naval objective. Prior to this war a

transport in military parlance in this country only meant a ship with facilities to carry men and that was all, and as many men as possible, for the reason that it was used from a friendly port of embarkation to a friendly port of disembarkation, and hence men that might be transported sleeping in three shifts a day in barracks would have an opportunity for rest and recreation after disembarkation to be at top form and fit for combat.

There came a time in this war when that type of transport was no longer acceptable, because of the geographical problem involved, a problem that required that combat troops be transported direct to the points of combat and landed on hostile shores at the peak of physical fitness ready to fight.

Thus was born and conceived the APA, a special type of vessel, which we will show was conceived by the Navy, ordered by the Navy, intended for Naval use, was actually used by the Navy and served a particular purpose.

And thus it was that on November 9, 1943, Admiral Leahy, who was at that time Chief of Staff of the Commander-in-Chief of the Army and Navy, and who in a letter of November 9, 1943, [35] acting for the joint chiefs of staff, sent a letter to Rear Admiral E. S. Land, Chairman of the Maritime Commission, and this letter will become of important bearing in the issues of this case, and the reason that this letter becomes important is, and we will be able to show, that it initiated a line of correspondence between the Navy and the Maritime Commission insofar as these particular twenty-two vessels are con-

cerned, which shows that they were intended for naval vessels. The issue or the fact which this type of evidence becomes important for, as to whether the vessels were for the Navy, is because we intend to show that our contractual relations are covered by the Vinson-Trammell Act, and the Vinson-Trammell Act has to do with naval vessels, so it becomes important in this case to know whether or not these vessels are naval vessels, in view of the test in the northern Pacific case, whether they were intended for that use. So the letter of Admiral Leahy of November 9th becomes important because in that letter, addressing himself to the chairman of the Maritime Commission, he states, "It is requested that the Maritime Commission construct 130 standard APA's and 30 standard AKA's to be completed as early in the fourth quarter of 1944 as practicable."

And it is interesting to note that in that connection he describes the vessels as military types——

Mr. Walkup: Pardon me, could I interrupt [36] at this moment?

I will have objections, your Honor, to the introduction in evidence of certain documents that counsel is now arguing from. It is true we admit the authenticity of the documents, and we do not object to the use of copies by stipulation instead of originals subject to all objections.

Now, I think counsel should offer these various documents, at which time we could interpose our objections and have a ruling, and if they are ruled inadmissible it would be improper to argue about them. I don't know whether this is an opening statement or argument.

Mr. Pentz: It is an opening statement, and I intend to pass briefly upon the type of evidence I want to introduce in this case, and also at least one point of law involved. I do not intend to recapitulate all the points of law raised in our pre-trial conference. I expect to speak only of one which has been unanswered. This is an opening statement, Mr. Walkup.

Mr. Walkup: It is understood we reserve our objections to the various documents that you are going to talk about.

Mr. Pentz: I have not introduced them or even attempted to.

The Court: Proceed.

Mr. Pentz: Now, when in his letter of November 9, 1943, Admiral Leahy asked the Maritime Commission to construct 130 APA's, he described them as being military types. He states [37] "It is appreciated that the building of these military types will unavoidably result in a considerable reduction in dry cargo tonnage, and it is recommended that this reduction be held to a practicable minimum."

He also states, "It is noted that military types already on order are being delayed."

Now, that letter, which we will offer into evidence, we will show touches off a series of events. In the first place, we must remember that at that time our prime contract, 15762, has been in being about six or seven months. It's date is April, 1943. Admiral Leahy's letter is November of 1943.

The first keel on the first of our twenty-two vessels was not laid until May of the following year. So

that when we interpret this contract, this prime contract, we are not dealing with ships that had been built, but we are dealing with only ships which were to be built, as events turned out, with the twenty-two vessels we are disputing about, and it is stipulated they were a part of the 130 APA's requested by Admiral Leahy.

Now, the events that I expect to show that that letter touched off were these: Immediately the Maritime Commission corresponded with the Navy, much of it between the Hon. James Forrestal, the Secretary of the Navy, and the Maritime Commission, in which they agreed upon the details of this program of ship procurement. [38]

Those letters will be material to show that these particular twenty-two vessels under our sub-contract were intended for use by the Navy. Our evidence will show that they were accepted by the Navy, commissioned by the Navy, given Navy numbers, Navy names, actually used in the prosecution of the war with the combatant fleet.

Now, what was the law as it existed at that time? Prior to the war, prior to 1940 there had been developed a plan for so-called profits limitation in the Vinson-Trammell Act. And, incidentally, your Honor, if there is any desire on your part to skim over this statute as I remark concerning it, I have an extra copy of our pre-trial statement here available for that purpose.

The plan that existed prior to 1940 was in the Vinson-Trammell Act, and it in effect stated that all of such contracts and sub-contracts should re-

quire a provision whereby the contractor promised and agreed to pay back everything that we received in excess of ten per cent of his stated contract price. But a significant change occurred in 1940, because it was in connection with the Internal Revenue Act of 1940 and specifically Section 401 of that Act that Congress reflected in its wisdom a change in public policy insofar as what manner or means should be adopted by this country in the defense efforts to limit war profiteering.

In adopting the 1940 Revenue Act, Section 401, Congress [39] stated that this provision in the Vinson-Trammell Act requiring the return of excess over 10 per cent should be repealed—should be suspended, rather, during the period that the excess profit tax would be in effect, but Congress went further, as though to say, “And there shall be no effort to avoid the policy that we consider to be wise in this country,” because in Section 401 of that Revenue Act, Congress went on further to say that any agreement to pay into the Treasury profits in excess of 10 per cent of the contract price of any such contract or sub-contract shall be without effect.

Now, why did Congress adopt that legislation?

In the House Report, if your Honor please, in discussing the policy that Congress desired to incorporate in this so-called repealer of the Vinson-Trammell Act, the following statement was made, and this is revealing of the public policy and it is the basis upon which we feel our contention—that is, one of the chief bases why we consider our position in this case to be sound:

“In this report on the revenue bill of 1940, your Committee expressed the desire that the re-armament program should furnish no opportunity for the creation of new war millionaires or the further substantial enrichment of already wealthy persons. Your Committee is still of this opinion, but, at the same time, deem it advisable to stipulate the cooperation of private [40] enterprise in the defense program by suspending the profit limitation of the Vinson-Trammell Act, applicable to the construction of naval vessels and Army and Navy aircraft. In addition, it is considered desirable to provide special amortization with respect to the facilities necessary in the national defense, in order further to encourage the participation of private enterprise in the re-armament program.

“While these benefits are being accorded to business engaged directly in the defense program, your committee feels that they should be accompanied by a general excess profits act, rather than one limited to contracts for Army and Navy aircraft and naval vessels, or even to munitions manufacturers generally. Accordingly, the tax provided in the bill will apply to corporate profits from all sources. This is felt desirable since the segregation of profits directly attributable to the expenditures of the Government for the defense program presents insuperable difficulties.

“Upon thorough examination, it appeared that the excess-profits tax should apply only to corporations”—now this is important—“as individual and partnership incomes are subject to heavy surtaxes

upon net income, whether or not left in the business, while, [41] in general, neither corporations nor their stockholders pay surtaxes upon earnings which are not distributed. Moreover, since all of the assets of an individual, whether he be a sole proprietor or a member of a partnership, are at the risk of the business, it is extremely difficult, if not impossible, to determine the capital actually invested.

“Since the proposed excess-profits tax will apply to all corporations, including corporations now subject to the special profit-limiting provisions of the Vinson-Trammell Act, it is felt that such special provisions should not apply while the excess-profits tax is in force. Uniformity will thereby be achieved in the treatment for tax purposes of all abnormal profits resulting from the national defense program. It is not believed that the limited types of businesses affected by the Vinson-Trammell Act should be treated, during the period in which the excess profits tax applies, differently from the way in which other businesses engaged in production for the national defense are treated.”

In other words, Congress said that there should be one uniform way for the control of profits in naval contracts, and that was the way that every other citizen was treated in other types of national programs, and that was the income tax, [42] because individuals had high surtaxes, and those were paid after excess-profits tax for corporations, and there would be a positive hindrance to private enterprise so far as the naval program was concerned to single them out and treat them differently.

Now, Mr. Walkup contends that this is of no connection to the issues of this case, because he will argue, as he has revealed in his pre-trial statement, that our prime contract was not signed by the Secretary of Navy. Now, that is virtually his case.

Mr. Walkup: I would like to be heard myself on that point.

Mr. Pentz: Naturally, Mr. Walkup, I am only trying to reflect your pre-trial statement. I may not be entirely accurate, but one of the chief points involved in Mr. Walkup's case is the fact that our prime contract was not signed by the Secretary of the Navy, or that it was not a naval contract, because he would have us believe that since the Vinson-Trammell Act refers to contracts which are signed by the Secretary of Navy, that unless we can bring ourselves within that narrow opening, that we cannot have the benefit of the Vinson-Trammell Act, or its repealer in Section 401 of the Revenue Act.

Now, I am going to dwell on only one point of law which has not been answered by Mr. Walkup in his pre-trial statement [43] of position, nor even has there been any endeavor to answer it, and I submit that it is unanswerable. In prime contract MCE-15762, which is Plaintiff's Exhibit A, it is provided in its preamble that it is made pursuant to public law 247 and 630. In its first paragraph it states, "Under the provisions of Public Law 247 and 630 (77th Congress) the Commission is authorized to contract," et cetera, et cetera.

Now, an examination of Public Law 247, although it is an appropriation act, reveals that in its last provision it states that the provisions of Sections 2 and 4 and the several proviso clauses contained in Section one of said act of February 6, 1941, which is Public Law 5—let me repeat and interpolate, the last provision of Public Law 247 states that the provisions of Public Law 5—Section 4 of Public Law 5 shall apply to all the activities and functions which the Commission is authorized to perform under this title. The contract incorporates Public Law 247, Public Law 247 incorporates Public Law 5, and Public Law 5 is essentially important because it is, insofar as I know, one of the only two authorized statutes directing the extent the Maritime Commission is authorized to go, and it is important because it says in its section 4 the Commission is authorized to construct, reconstruct, repair, equip, and outfit by contract or otherwise vessel or parts thereof—and this is what is important—for any other department or agency of [44] the government to the extent that such other department or agency is authorized by law to do so for its own account—to the extent that such other agency is authorized by law to do so for its own account.

Now, since there were only these two basic authorizations for the Commission to act—one was in the Maritime Commission Act of 1936 which gave the Commission power to build ships for private enterprise, such as passenger vessels, cargo ships under the so-called financial subsidy program, with

which we are not concerned here—the only other authorizing provision of law is Public Law 5, which states, and I repeat, that the Commission is authorized to build ships for any other agency of the Federal Government to the extent that such other agency is by law authorized so to do for its own account.

Our prime contract MCc-15762 incorporates Public Law 247, Public Law 247 incorporates Public Law 5, and Public Law 5 states that it is limited in its construction for another agency to the extent that such other agency is limited.

Now, if it be conceded that if our prime contract has been executed by the Navy—if that were true Mr. Walkup must admit that the special provision number 4 for the repayment back of everything over 10 per cent is without effect. He acknowledges that when we addressed your Honor at our pre-trial conference, and I am quoting Mr. Walkup, when he said as follows: [45]

“Now, our contention is that the contracts were not with the Secretary of Navy, but were with the United States Maritime Commission, and that the Vinson-Trammell Act has absolutely no application to contracts of this kind. If these were contracts which Mr. Birnie entered into with the Secretary of the Navy for construction of or outfitting of a vessel in a Navy yard, as many contractors do, we would not be permitted to include in the contract the limitations on excess profits. However, these particular contracts were entered into under Public Laws relating to the Maritime Commission. The

prime contract was between Permanente and the Maritime Commission, and the sub-contract was between Birnie and Permanente, but under the Maritime Commission set-up was not a sub-contract which would come under the Vinson-Trammell Act."

So Mr. Walkup agrees with me that if the Secretary of Navy or the Navy Department had executed our prime contract, this return of excess profits undertaken under Special Provision 4 of VS-14 would have no effect, because the repeal of the Vinson-Trammell Act stated it could not, but if the navy could not do it, then the Maritime Commission could not do it, because of Public Law 5, and if the Maritime Commission does it, it does it in excess of the authority under which the Navy Department could do it under the law, because when public law [46] states that the Maritime Commission may construct these vessels only to the extent that such other governmental agencies are authorized by law to do, we conclude, and it is unsailable, that if the Secretary of Navy could not have inserted that proviso, which Mr. Walkup agrees he could not, then the Maritime Commission likewise cannot, and, thus, when the Maritime Commission, through its prime contractor—not the sub-contractor but the prime contractor, had that proviso put in, it was doing so beyond its authority, because the Secretary of Navy himself could not.

Thus, having established that our contract does come within the terms of the Vinson-Trammell Act

repealer, all we have to do, then, is to show that the vessels were intended for naval use.

The Addendum Number 2 to the prime contract acknowledges as much, because in addition to the correspondence which shows them to be naval vessels and intended as such, the prime contract in its Addendum Number 2, which is already in evidence and which gave birth to our VS-14, states:

“Under date of April 22, 1943, the Commission and the contractor entered into a contract (herein called the ‘Vessel Contract’)”—and they are referring to the prime contract—“for the construction of seventy-seven cargo vessels in accordance with plans and specifications designated ‘design VC-2-S-AP2’”; [47]

“The Commission has heretofore directed the contractor to complete 22 of such vessels as combat loaded troop ships (design VC2-S-AP5) thereby greatly increasing the scope of the work to be performed under such contract.”

Thus, if your Honor please, we find that this is not a question as to whether or not Mr. Birnie is going to retain inordinate profits at all, this is a case to determine whether the Maritime Commission receives these funds for its own budget purposes or whether the Department of Internal Revenue in income tax just refunds to the extent that the income tax and its high surtax is applicable to Mr. Birnie, and we maintain we are entitled to have the benefits of applying losses against profits as every other individual in an income tax situation is entitled, and that just because Mr. Birnie hap-

pens to be engaged in the construction of a naval vessel, he should not, because of that fact, be penalized and set apart, and we maintain it was the policy of Congress that such should not occur.

With regard to the bonding company, as I mentioned earlier, we consider that as a matter of law the bonding company is not liable for any of these claimed over-payments, no matter who is on the Birnie-Permanente issue, for the reason that this special provision for in our VS-14—and again that special provision 4 of VS-14 is the paragraph [48] where we are charged with this promise to repay to the Commission these excesses over 10 per cent—in that Special Provision 4 it is provided that, and I will quote one partial sentence, “although the accounting for profit payments to be made under the provisions of this article shall be in accordance with the provisions of Section 505-B of the Merchant Marine Act of 1936, as amended,” et cetera, et cetera—the important thing being that the payments to be made under the provisions of this article—being the so-called excess profits over 10 per cent—shall be in accordance with the provisions of Section 505-B of the Merchant Marine Acts, “but the surety under such contracts shall not be liable for the payment of such excess profits.”

We submit, your Honor, that where in VS-14 provisions of Section 505-B of the Merchant Marine Act of 1936 are expressly incorporated by a reference, that that portion of 505-B which says, “but the surety under such contracts shall not be liable for the payment of such excess profits” is incor-

porated in our sub-contract just as much as though it expressly had been incorporated therein, and we submit there is no rule of interpretation, there is no rule of construction in any logical view that can write that out of the provisions of our sub-contract, and that if the interpretation of 505-B meant anything—unless you are going to say it meant nothing, which we cannot do, it meant that the surety under such contract [49] shall not be liable for the payment of such excess profits tax, exactly as it is therein so stated.

That is the conclusion of my opening statement, if your Honor please.

Oh, Mr. Mellin has called my attention to two things that I intended to comment briefly on, and that is insofar as any possible liability of the bonding company for attorneys' fees is concerned, we take the position that if the bonding company is not responsible or liable in any way for the return of the so-called excess profits for which suit is brought, it cannot conceivably be liable for attorneys' fees for a suit brought to produce the result for which it is not primarily or in any way responsible, and the second point is that, that Mr. Walkup has dwelt in passing upon the failure of Mr. Birnie to file sworn statements of his costs and other material that the Maritime Commission is by virtue of the terms of Special Provision 4 entitled to have.

I wish to comment briefly on that. There are two answers: In the first place, it is immaterial—I will withdraw that. I had assumed we had stipulated to the actual making of that final deter-

mination, because there is no dispute between us, and therefore whether he had or had not filed this report would have been immaterial, because we are stipulating as to what their final determination was, and it is correct. I mean the reason why Mr. Birnie did not file this report is because [50] we have always felt, and we still feel, and that is what this lawsuit is all about, that something in special provision 4 is enforceable against us. That is the nub of the whole lawsuit, and we had followed the procedure set forth in Special Provision 4, we would have been flying in the face of the various contentions we are making in this lawsuit, estoppel, waiver, and other contentions. So any records I am prepared to introduce in this lawsuit as to costs and other material called for by special provision number 4 are not to be deemed as a waiver of or inconsistent with our position that the entire provision is without effect for the reasons I have mentioned.

Actually, I think Mr. Walkup may be willing to stipulate with me that all of Mr. Birnie's records were available to the accountants and field men for the Maritime Commission, and they spent weeks going through his records, and there was no effort to not make a full disclosure. The only thing was we could not follow the provisions of that special provision number 4 and at the same time contend it has no effect.

The Court: Now, Mr. Walkup, indication has been made to you of certain evidence which will be documentary which will be offered by the defendant, and you have indicated that you are pre-

pared to make objections. I think perhaps I might hear from you as to the grounds of your objections.

Mr. Walkup: Yes, your honor. It will entail a rather [51] lengthy presentation, your Honor, and largely a repetition of what has been previously briefed.

In making the presentation of our evidence, I did not make an argument on the law, because it was thoroughly briefed in the pre-trial statement of position filed with the court. Anything I would now say would be a repetition of that.

The Court: Don't do that. It is now 4:00 o'clock, and if you have nothing further to give me, other than what you have already given me in your brief, then over the holiday I will look those over and be in a position to rule on the matters as they come up Thursday.

Mr. Walkup: Perhaps I could assist the court in this respect: The various documents to which I will offer objections break down into three or four chief classes. For example, certain documents relating to title to these vessels long after they were built, some three years afterwards, title by agreement between the Maritime Commission and the Navy was given to the Navy as part of a trade for other vessels. Now, I will have one objection to all testimony going to that phase of the case; that is, subsequent title to the vessels, which has nothing to do with the construction of them.

Then there will be objection to other testimony which will be offered as to what the Navy called these vessels and what the Navy did with them

after they got them from the Maritime Commission, our position being that Permanente built [52] them for the Maritime Commission, delivered them to the Maritime Commission under a Maritime Commission contract, and that after that anything that the Maritime Commission did with them in delivering them to the Navy or anybody else is immaterial so far as the issues of this case are concerned.

That will be another line of testimony to which we will object.

And another line of testimony to which we will object will be the series of negotiations between the joint chiefs of staff and the navy and the Maritime Commission with reference to modifications in these various vessels which were being built by the Maritime Commission, and I think we can serve the Court by breaking those documents down into classes and preparing my objections to each class so that possibly we won't have to object to questions and answers, but merely have a running objection as to types of testimony.

Mr. Mellin: If your Honor please, I would like to ask Mr. Walkup if it is not so, as we understand his position, he will object to any questions and any evidence attempting to show that these are naval vessels in support of our position under the theory of law and the theory of authorities, and will attempt to stand on the contract purely as written? We think that the objection goes to that one complete line, and it may—of course, we feel that sustaining that objection is tantamount to deciding that the law which we have cited [53] to the Court

is not applicable to this situation, and would withhold from the Court the salient facts showing these are naval vessels within the purview of the case Mr. Pentz has mentioned, so if the Court could rule on the objection to that line of testimony and in the event the Court ruled that it wasn't material then the objection that Mr. Walkup has could go to all of our testimony, because that is the point of our testimony.

We understand there is only one factual issue: Are they naval vessels within the meaning of the acts and the authorities and everything else?

Mr. Walkup: There is one point I would like to emphasize since your Honor is going to review these briefs over the holiday, and I don't believe it is stressed in the pre-trial statement of Permanente to the extent it should be, and that is the point of Section 401 of the Revenue Act of 1940 repealing the profit limitations provision of the Vinson-Trammell Act. Now, counsel have argued in their brief that Congress by this section 401 of the Revenue Act of 1940 intended to set up an overall scheme for control of profits on all naval vessels construction. However, Section 402 of the same act passed by the same Congress sets up a similar profit limitation suspension on Maritime Commission contracts, although Congress clearly distinguished between Maritime Commission contracts and Navy contracts, and in Section 402 the suspension [54] of the profit limitation provision applied only on Maritime Commission contracts, and the profit limitation was suspended only where the prime con-

tractor and the sub-contractor were both corporations.

Now, Birnie is not a corporation, and, therefore, the suspension of Section 402 of the Revenue Act would not apply to Birnie, because he is an individual, and it only suspends limitations as to corporations.

Now, therefore, Birnie has got to convince the court that this is a Navy contract rather than a Maritime Commission contract, because if it is a Maritime Commission contract, then Section 402 suspends the profit limitation as to corporations but not as to individuals like Birnie. So he has got to sidle over from a Maritime Commission contract, which we state this very clearly was, and make it into a Navy contract. Congress was quite clear in specifying that the Vinson-Trammell Act related to Navy contracts, contracts made by the Secretary of the Navy. No authority has been presented to the Court by Birnie that the Vinson-Trammell Act profit limitation suspension applies to Maritime Commission contracts.

Congress specified Navy Contracts, contracts having to do with naval vessels and contracts having to do with Army and Navy aircraft. They at no time specified contracts having to do with Maritime Commission vessels. Maritime Commission [55] contracts were covered by Section 402, passed by the same Congress, and which left individuals out of the benefits, and that point is covered under Section 3 of Permanente's pre-trial statement starting on Page 38, and continuing through Page 40. It is

a brief presentation, but it refers to congressional committee reports, and as an appendix B to our pre-trial statement of position, we set forth the text of Section 402 of the act, but the important sentence as far as this litigation is concerned is the last sentence under A of Section 402, which says that sub-section (j) only applies when both the principal contractor and the sub-contractor are corporations.

So Mr. Birnie, in order to get relief, not being a corporation, is forced to try to convince the court that he comes under an act covering naval construction, rather than Maritime Commission construction.

I want to emphasize that point, because it is not emphasized in the pre-trial statement of position.

Mr. Pentz: I feel, your Honor, when you get an opportunity to read our brief you will find adversely to Mr. Walkup's position, because we maintain that as soon as you start building naval vessels, vessels intended for the use of the Navy, you are not under Section 402, as contended by Mr. Walkup in any way at all, but you are under Public Law 5, which is the point I mentioned to the effect they have no more [56] authority once the vessels are destined for the use of the Navy.

That will be seen by going over our briefs.

The Court: May I inquire of counsel how long you think it will take to put the evidence in in this case? Will one day be sufficient?

Mr. Pentz: Yes, your Honor.

Mr. Walkup: I believe so, your Honor.

The Court: All right, Thursday.

(Thereupon the further hearing of this matter was continued until Thursday, February 23, 1950, at 10:00 o'clock a.m. [57])

Thursday, February 23, 1950, 10:00 A.M.

The Clerk: Number 26215, Permanente Metals Corporation vs. John Birnie, et cetera, et al.

Mr. Walkup: Ready.

Mr. Pentz: Ready.

The Court: Very well, you may proceed.

Mr. Pentz: Have you rested?

Mr. Walkup: I rested, yes.

Mr. Pentz: I will call Commander Herman Barter.

HERMAN BARTER

called for the defendants, sworn.

Direct Examination

By Mr. Pentz:

Q. Where do you reside?

A. Sierra Madre, California.

Q. How long have you resided there?

A. Over four years.

Q. Are you a member of the United States Navy? A. Yes.

Q. And what is your rank?

A. Commander, on the retired list.

Q. Your status is on the retired list?

A. Yes.

Q. Over what period of time have you been connected with [58] the United States Navy?

(Testimony of Herman Barter.)

A. I entered the Navy in June of 1917, and I have been connected with it continuously since then.

Q. Now, briefly, Commander, will you give us your naval experience in the United States Navy up until approximately 1941?

A. I entered the Naval Academy in 1917, graduated in 1921, in June. From there I was assigned to the battleship Mississippi in the Pacific fleet, and was aboard her for a little better than two years, and then over on the Yangtze Patrol in China, and was in China from 1923, returning in the early part of 1926.

I was assigned to a vessel, a destroyer, European forces, and I served on that vessel until about July of 1927. At that time I was hospitalized as a result of an infection I had picked up in China, and I was hospitalized for about fifteen months.

At the end of that time I was assigned as Personnel Officer for the receiving ship, Philadelphia Navy Yard. In November, 1930, I was assigned to an auxiliary vessel as her navigator and served as her navigator for thirty-nine months, until January of 1936, the last nine months of that time as her executive officer or second in command. On that vessel I was assigned as Assistant Ship Superintendent in the Navy Yard, Philadelphia, and served in that capacity until—that was— [59] did I say 1936, the Philadelphia Navy Yard?

The Reporter: Yes.

The Witness: That should be 1934. I was thirty-nine months, from 1930 to 1934. I served as As-

(Testimony of Herman Barter.)

Assistant Ship Superintendent, Philadelphia Navy Yard, until April, 1936.

At that time I was assigned to the battleship Texas, and served on the battleship Texas until April of 1939.

From there I was ordered to duty at the branch Hydrographic Office, San Pedro. After being on duty approximately a month, I was ordered for physical examination for promotion, and as a result of the previous hospitalization and inspection I was ordered to the San Diego Hospital and subsequently retired.

Q. (By Mr. Pentz): Were you ordered back to duty around 1940?

A. I was ordered back for duty and reported for active duty again in July, 1941.

Q. What was your duty as of that time?

A. I was ordered to duty in the office of Chief of Naval Operations of the United States Navy, in Washington, D. C.

Q. How long did you serve in the office of the Chief of Naval Operations of the United States Navy?

A. From July, 1941, until my detachment the first of October, 1945.

Q. Now, Commander, does the office of Chief of Naval Operations of the United States Navy have a function to [60] perform as regards the characteristics of vessels to be procured by the Navy?

A. Yes.

Q. What is that function?

(Testimony of Herman Barter.)

A. It is to establish the military characteristics required of the vessels for the services which they are expected to perform.

Q. And when you say the services which they are expected to perform, do you have in mind a military object that might be in the minds of the Navy?

A. Duties and military objectives, yes.

Q. Now, Commander, I call your attention to a group of twenty-two vessels which in the Navy were known as APA's and with naval numbers 204 through 225, inclusive. Are you personally familiar with the type of vessel represented by those twenty-two vessels?

A. Yes.

Q. And in my questions, Commander, when I refer to the vessels, subject matter of this lawsuit, will you please understand that I am referring to those twenty-two vessels you have just testified you are familiar with?

A. Yes.

Q. Now, in the office of Chief of Naval Operations, is there an officer whose duty it was to determine the characteristics of the vessels which became known as naval APA's [61] 204 through 225, inclusive; in other words, the vessels the subject matter of this lawsuit?

A. Yes, sir.

Mr. Walkup: Your Honor—pardon me, may I have the answer stricken pending objection?

The Court: Well, it will be understood your objection precedes the answer.

Mr. Walkup: Yes. At this time I would like to enter a general objection to any testimony as to the

(Testimony of Herman Barter.)

Navy Department's connection with these particular vessels involved in this litigation at any time as being not binding on Permanente Metals Corporation or Birnie. It is the same point that I mentioned briefly the other afternoon, and possibly I am premature and should wait until he gets to the specific questions.

The Court: Well, I am prepared to make my ruling upon these objections that I sense are going to be made by you as the evidence progresses. As I understand it, the crux of the controversy between Permanente and Birnie is whether or not they are naval vessels. I think it is expeditious to receive this evidence, and should I finally decide the case in accordance with Permanente's theory, the implication necessarily would be that I have given no consideration to this evidence to which objection has been made. In that event, of course, no injury would result to the plaintiff from the ruling. [62]

However, there would be a saving of time in resolving the issues in favor of the party who finally prevails, because if I decide in favor of the plaintiff's theory and the reviewing court decrees the judgment should follow the theory for which the defendant contends, the record would be complete. So, for those reasons I am going to overrule the objection you just made and the objections which I sense you intend to make, and receive the evidence. The objection is overruled.

Mr. Walkup: May we, your Honor, in order to avoid continuous objections as the testimony pro-

(Testimony of Herman Barter.)

ceeds, and in the interest of an orderly presentation of the evidence, have a running objection to any such testimony as to the activities of the Navy before or after the construction of these vessels? It will save my continuously interrupting with specific objections.

The Court: There is no objection to a running objection?

Mr. Pentz: No.

Mr. Walkup: Thank you, your Honor.

Q. (By Mr. Pentz): Commander, who was the officer in the office of Chief of Naval Operations, United States Navy, whose duty it was to determine the characteristics desired by the Navy that were incorporated in the vessels, the subject matter of this litigation? A. I was that officer. [63]

Q. And did you hold that duty continuously through the time of your duty with that department of Chief of Naval Operations?

A. My answer to that question is yes, for this particular naval designation, APA.

Q. Now, in the procurement of the vessels covered by this lawsuit, what was the military objective in the mind of the United States Navy?

A. The objective and requirement was to have a sufficient number of this type of vessel to take troops from a friendly port and enable them to land in enemy territory and land in a fighting condition and to give them protection when they were nearing the enemy shore from aircraft, and give

(Testimony of Herman Barter.)

them as much protection as possible prior to and during the landing.

Q. Now, what characteristics were incorporated in the type of vessel represented by these vessels in our lawsuit? What characteristics were incorporated in those vessels to facilitate these military objectives?

A. One thing, the protection of troops when nearing the enemy shores from enemy aircraft was to afford heavy anti-aircraft armament. In the bow we replaced what had been a five-inch gun on other vessels of this type with a 40-millimeter quad. Prior to these particular vessels that you are referring to, of armament, about the best we have had or required was two 40 twins on the after quarters of the ship; in other words, two 40-millimeter twins or four 40-millimeter guns. [64] These particular vessels carried twelve of those parallel. In addition, we had approximatey fourteen, maybe sixteen of the 20-millimeter guns.

Q. That latter category was additional armament? A. Additional armament, yes.

Q. —to that which you have been describing?

A. We felt that necessary because these vessels were required for the Japanese invasion, and during the final ferrying operations we had been having Kamakaze attacks in increasing numbers, and this additional armament was put on for that reason.

In addition, these ships carried landing craft of two types. One was a 36-foot landing craft to land

(Testimony of Herman Barter.)

personnel and vehicles. The ship was equipped with triple bank whaling davits——

Q. May I interrupt you there, Commander: Have you exhausted your information as to the facts insofar as the landing craft that were put on these vessels?

A. There were two types, the 36-foot for landing personnel and vehicles, and the fifty or sixty foot what we call tank ladders, LCN-3 or LCN-6. One was a fifty foot tank ladder and the other was a 36-foot landing craft.

Q. Insofar as the characteristics of this type of vessel were concerned, where were those landing craft to be stowed?

A. They were stowed top side, they were stowed in cradles [65] and with these cradles triple banked whaling davits were provided. That economized deck space. We sacked them one on top of another, and the other in the davit, which meant each davit would accommodate three of the LCN-3's or LCN-6's. We did that for the purpose of getting the maximum number of that type of landing craft, because that was the kind that got the troops ashore, the LCN-3's or LCN-6's.

Q. The LCN-6 is the other type of landing craft?

A. The other type that was carried, and the ships had to be equipped with a boom of at least a 30-ton capacity to make this type of landing craft water borne.

(Testimony of Herman Barter.)

Q. Was that type of boom arrangement different from ordinary types of cargo vessels?

A. May I clarify that question? Do you mean the ordinary merchant cargo vessel, or Navy Cargo vessel?

Q. Well, either one, or both.

A. Well, it depends upon what was the service of the cargo vessel. Ordinarily with the boom of any vessel that we acquired we usually had to provide additional handling facilities of thirty tons for the LCN-3's or LCN-6's.

How that boom capacity compared with the ordinary merchant cargo vessels, I would state to my knowledge that the usual boom capacity was around a ten-ton capacity. There might be exceptions.

Q. Commander, will you proceed to describe other characteristics [66] that were incorporated in this type of vessel to meet these particular military objectives.

A. Another characteristic that we considered very important and required was what we call the ship must be a two-compartment ship, and the ship was changed structurally, if necessary, for additional bulkheads or for a cargo space or of such size bulkheads were added and ballasting were added, if necessary. By two-compartment ship, that was a stability condition required whereby an underwater hit at a bulkhead and two compartments were flooded at the same time, the ship would have a reasonable chance of surviving. Also the ballasting was necessary to complete this condition, because we carried combative troops on board, and

(Testimony of Herman Barter.)

with damaged cargo landing facilities, if the ship was damaged sufficiently, she wasn't near so apt to turn over. In other words, she would set in the water and give the maximum number of troops a chance to get over side. So that was a military characteristic we required in the APA.

Another thing——

Q. May I interrupt you, Commander: This double compartment feature that you have described, was that to be found in ordinary commercial cargo vessels?

A. I would say no, or in ordinary transports.

Q. Now, I interrupted you, Commander. Will you proceed with the characteristics in these vessels?

A. Another characteristic that was required in this vessel, [67] certain cargo space was set aside and arranged to carry sufficient troop equipment that would sustain the troops probably for the first three or four days. In addition to that, troop munitions, the amount was specified, troop gasoline for their vehicles was specified to be below the water line and separated one from the other, the munitions in the prow of the ship, and we had the gasoline in the after end of the ship, so if we had underwater damage we wouldn't have munitions and gasoline in the same place.

Q. Were those vessels built in such manner as to accommodate this particular problem of stowage that you have described?

A. Yes. In addition, these vessels—we specified

(Testimony of Herman Barter.)

what we call a ready munitions space where the troops usually were ready before dawn, and this was a small space that would give them the ready munition that they would carry on their person prior to unloading what we refer to as their cargo munition.

These ships also had built into them something we had not had before, as a result of prior operations and recommendations of the division commanders and people who had been in the operations, we built in and specified a message center.

The Court: A what?

A. A message center. That is an army term, particularly a space designated and specified where they would central to one point, if they were confused or lost. We had not had that prior to this particular group of vessels. [68]

Q. (By Mr. Pentz): Were there other characteristics of these vessels that we are speaking of, different from the ordinary cargo vessels?

A. I would say that all of the characteristics of these particular vessels were different from cargo vessels, because these were not cargo vessels, they were transports.

Q. Well, I have in mind the particular characteristics of these vessels; for example, let me ask you with regard to facilities for generating electric power. Was there anything about this type of vessel in this lawsuit that was specially built in that category?

A. Yes.

Q. What was that characteristic?

(Testimony of Herman Barter.)

A. Due to the armament I have previously mentioned, the 40-millimeter twins and quads, they were all electrically operated and required additional generators to carry the load, the top side load of these guns. Of course, these vessels were outfitted to carry approximately between 14 and 15 hundred troops. In addition to that, they had a Navy crew of around 450. This was required to man the guns that were top side, the heavy armament that we had on them. They were also required for the boat crews for the landing craft. And we had built in these vessels a galley and mess facilities to accommodate over two thousand men, which in addition entailed refrigeration space to carry the food for that number of men. [69]

And these vessels, this particular group, we were able to get much better accommodations, because we specified the lay-out, or could supervise the lay-out, because the keels had not even been laid when we first started thinking about these. For example, we were able to put a great number of troops on the main deck by building a bunk house on the main deck. In the ships that were already in being, many times we had had to put bunk rooms well below the water line, and attempt to force air down to them for ventilation. In these vessels it was just the opposite. I think we had the best of accommodations for the troops on this particular type of vessel that we had on any of them that I know of.

Q. Now, Commander, did you have occasion in your official capacity in the office of the Chief of

(Testimony of Herman Barter.)

Naval Operations, United States Navy, to personally inspect and board any of the vessels of the type covered by this lawsuit?

A. Yes. I made a trip out to California or out to the West Coast in August of 1944. I came up from the south. I was aboard the first vessel out of Cal Ship. I was aboard the 204.

Q. Now, the 204 is which ship?

A. It is the first vessel out of Permanente.

Q. In other words, that is one of the particular vessels covered by this litigation?

A. Yes. I was also aboard the 157, which was the first ship [70] completed by Vancouver-Kaiser, Vancouver.

Mr. Pentz: No further questions.

Cross-Examination

By Mr. Walkup:

Q. Commander, during the war it is true, is it not, that the Navy had a certain amount of control over all ships that were sailing—that is, all American merchant ships had, under the Navy requirements, to have certain armament on them, gun crews, and certain features of that type because of war conditions?

A. I can answer that. I am familiar with the officer that put armament on a few merchant vessels, if that is what you are referring to. His name is Cleve. He was right across the hall from me, and I think I am familiar with the way he operated, or

(Testimony of Herman Barter.)

the way the office of Naval Operations operated under that condition, if that is what you mean.

Q. Let us take the Victory ships, the EC-2 and the VC-2—those are the designations for Victory ships, are they not?

A. EC-2 and VC-2—there are two types of victories—three types of C-2's; one was the EC-2, or the emergency cargo, the other was a straight C-2, and then the Maritime Commission brought out what they referred to as the VC-2.

Q. Now, the EC-2, the emergency cargo ship, that was known as the liberty ship?

A. Correct.

Q. Then came the straight C-2? [71]

A. Yes.

Q. Then what we knew as the Victory Cargo ship, the VC-2? A. Yes.

Q. Now, on the EC-2 and on the VC-2, and on the C-2, is it not true that the Navy Department required a certain amount of armament because of wartime conditions?

A. The Navy Department Chief of Naval Operations specified a certain armament on merchant ships, and furnished what they called armed guard crews, but that armament depended upon the zone of operation. It wasn't the same for every ship, and I don't believe every ship was armed. It depended upon the zone of operation. For example, the Murmansk, the Murmansk Zone was known as the hottest, and the vessels were convoyed and the Navy did attempt to give them armament and did attempt

(Testimony of Herman Barter.)

to give them men, and again there were zones—oh, for example, the West Coast of South America, there was practically little effort put into ships plying down there. So the guns simply depended upon the area in which the ship might be going, and some of them were left unarmed.

Q. Now, in the case of the VC-2, the Victory Cargo ship, being in the office that you were in at that time, you were familiar, were you not, with the fact that the plans and specifications of those victory cargo ships were made by the Maritime Commission with the assistance of a naval architect in the Navy by the name of George Sharp, and that the Navy made [72] certain recommendations to the Maritime Commission as to what armament should be on the cargo ships?

A. As a straight cargo ship, that is my memory, although I still again say that the armament depended upon the area of operation. They might have some, they might have none.

Q. As far as the Navy requirements of your office were concerned, then, they would vary with the field of operation for a particular ship, a particular type of ship, and also in extent as to various types of ships, dependent upon their intended use?

A. As cargo ships, that is correct.

Q. Now, the basic hull for these vessels involved in this litigation was the VC-2 hull, was it not?

A. That is correct.

Q. And the design for the VC-2 hull was a Mari-

(Testimony of Herman Barter.)

time Commission design with the assistance of George Sharp, the Naval Architect in the Navy?

A. The hull and the machinery, that is correct.

Q. Then the Navy Department, according to your testimony, recommended some additional features because of the particular use intended for these APA's?

A. I don't quite agree with that. When I said that the basic hull and the machinery were designed by George Sharp, yes. I am talking about the outside hull now, and just certain structure inside. We took the basic hull and put in [73] platforms, bulkheads, built cabins, spaces, staterooms, and, as I say, the—when I referred to the troop and munition cargo space, that was a compartment built well below the water line, that had nothing to do with the hull that George Sharp had designed. I refer to the two-compartment ship. That was accomplished—in a cargo vessel the economical load depends upon your cargo holds, and light wood. Now, for example, the cargo vessel might have a hold comparable to this court room, and to make it a two-compartment ship we would have to build a wall or bulkhead right through the middle of it, because this space would be of such size that if it were flooded the ship would sink. And I know these vessels were the—the basic hull and engines were the same, but the other features, the additional bulkhead, additional platforms, additional decks, additional—well, what we call outfitting up to carry over two thousand persons—fourteen hundred troops, a crew of 450, plus 87

(Testimony of Herman Barter.)

officers. With the facilities and the compartmentation, it was obviously a different ship. The total hull was the same up to the deck line, but——

Q. Commander, you say “we put in these changes.” By that you mean the Navy Department recommended or required these changes in the basic hull, you don’t mean that the Navy actually installed them itself, do you?

A. No, I don’t mean that. By that I mean that the Navy took the basic hull plan, the deck lay-out of the ship that [74] George Sharp designed and was under contract by the Maritime Commission—it was just like taking the floor plan for hotel rooms and putting in walls here and leaving them out there, if necessary, and so forth—the Navy was in conference with the Maritime Commission and recommended, suggested, and approved what they wanted.

Q. Yes, that was my point. But you of your own knowledge know that these vessels were actually constructed in Maritime Commission shipyards on the West Coast? A. I know that.

Q. And do you know of your own knowledge that the final working drawings and plans that were used in the shipyards were prepared by the Maritime Commission and by George Sharp?

A. The preliminary plans were prepared in the Maritime Commission in Washington, and were submitted to George Sharp for detail; that is correct. Along that line there is nothing unusual about that. The Maritime Commission built APA Number

(Testimony of Herman Barter.)

one and APA Number eleven right down here in Southern California, and the Navy had nothing to do with them until they were delivered to them. That was the "Thalen" and the "Doyen" by name. There is nothing unusual about the Maritime Commission building a ship for the Navy.

Q. Now, the Navy itself maintains certain naval shipyards, does it not? A. Correct. [75]

Q. (Continuing): —where the building operation is a naval operation? A. Correct.

Q. (Continuing): —such as the Mare Island and possibly the Hunters Point Yards?

A. Oh, yes.

Q. And in those particular yards the plans and specifications for the vessels are prepared by the Navy completely?

A. Not necessarily. I know that George Sharp prepared a lot of plans for strictly naval vessels. A vessel starting with an "A" is an auxiliary. That "APA" means auxiliary personnel attack, and I know that George Sharp actually prepared plans that were used to build, oh, perhaps destroyers or other vessels of that type. The Navy does not prepare all its plans.

Q. I didn't make myself clear. George Sharp is a consulting architect, who is available to anyone who wants to hire him and pay him his fee, is he not?

A. That is right, both the Maritime Commission and the Navy Department.

Q. That is right. Now, as far as the construction

(Testimony of Herman Barter.)

of naval vessels at Mare Island goes, isn't it true that the Navy prepares its own plans or specifications with or without the assistance of some consultant such as George Sharp, and as to those plans, the Maritime Commission has nothing to do with the [76] plans and specifications prepared, the Navy has its own shipbuilding technicians independent of the Commission?

A. Oh, yes, that is correct, but I still go back that the Maritime Commission prepared the plans for the APA 1 and 11, the "Boyen" and the "Thalen," in a like manner, which were Navy vessels.

Q. Now, does the VC-2 basic hull conform to the naval requirements for naval vessels that are designed for combat?

A. The basic hull, no. The basic hull, that was the reason it was changed to be a Navy vessel, built in so that that hull—that ship would be a combatant vessel, have a chance to survive in combat.

Q. It is true, is it not, that the Navy requirements for a vessel which is designed for a combative vessel are much more stringent as to construction than the requirements for the basic hull of the VC-2?

A. That is correct. That is the reason that we required the design to be built like that. The basic hull—the outside dimension of a hull is what I consider basic hull—was of such strength as to hold it together, but these other features had to be built into these ships to make them suitable for the duty.

(Testimony of Herman Barter.)

They had to have a chance to survive in combat, and also with the heavy armament that we put on the top side, they required strengthening to support the guns and all that we had put on—the ready munitions box, the additional weight [77] we put top side.

Q. Is it not true, even with the modifications that were made at the suggestion of the Navy Department, the basic hull even as modified would still not comply with the naval requirements for a combatant vessel?

A. Yes, in this type of vessel it was the best we had.

Q. That is right, but it was basically a cargo vessel, it wouldn't meet Naval standards for combatant vessels?

A. As I say, these were the best combatant transports that we had, in my opinion, because we had a chance to build into these ships, because the contracts had not been let, the keels had not been laid—build into these ships features we considered necessary to make the vessel the best transport ships we had, or could get. In other words, these were the 1945 model.

Q. Do you know of your own knowledge the proportion that the Naval conversion features of these APA's bore to the total cost of the vessel?

A. No, I wouldn't be in a position to give that.

Q. Are the Navy shipbuilding standards the same as the American Bureau of Shipbuilding standards?

(Testimony of Herman Barter.)

A. I cannot answer that. I don't imagine—that would be an opinion, of course——

Q. Are you sufficiently familiar with the Navy standards for ship construction to know that there is a detailed [78] calculation of every member of the vessel in order to meet the Navy requirements for requisite strength and minimum weight?

A. Well, I certainly have the knowledge that there are detailed calculations of the strength and minimum weight of everything that goes into the construction of anything, whether it is a Navy vessel or it is the San Francisco Bridge.

Q. My point is this, Commander: During this emergency ship construction program, these very detailed and fine requirements that go into a Navy combat vessel were not put into the Victory cargo ships that were constructed in such mass production in the Maritime Commission yards, were they?

A. I was on duty at the office of Chief of Naval Operations for the four years during the war. Had I been on duty in one of the yards that were building ships in detail, I could probably answer that. I do know from personal knowledge that a lot of the rules had to be excepted—I mean, where we had certain standards we had to reduce those standards because of materials available and other conditions, whether it was a Navy vessel or anything else. That was done through the war.

I know on critical materials we accepted or we authorized to accept lower standards than we would in peace time perhaps. That would be beyond our control.

(Testimony of Herman Barter.)

Mr. Walkup: That is all. [79]

Cross-Examination

By Mr. Collett:

Q. I would like to ask a few questions, if the Court please. Do you have any interest in this litigation, Commander? A. No.

Q. Are you a friend of the plaintiff, Mr. Birnie?

A. Yes. Oh, the plaintiff? No.

The Court: Mr. Birnie.

A. No, I am certainly not a friend of Mr. Birnie.

Q. (By Mr. Collett): Is he an acquaintance of yours?

A. I have seen him once in my life.

Q. Have you discussed the matter of your testimony with counsel for the plaintiff in this case?

A. Oh, yes.

Q. You have. Have you ever been in actual operations during the course of the war?

A. In this war I wasn't in combat for the reason of my physical disability. When I was ordered—before I was ordered for duty I reported for physical examination, I was to be put in Class A, B, or C. Class A was duty anywhere, anyplace; Class B was shore duty any place; Class C was shore duty only in the United States. The doctors placed me in Class C, and I spent the war in the Office of the Chief of Naval Operations in Washington.

Q. You say you were in the office of the Chief of Naval [80] Operations from the first of July, 1941, to——

(Testimony of Herman Barter.)

A. To the first of October, 1945.

Q. During that time did you have under your personal supervision the specifications as to the construction on all AK's and AP's?

A. Specifications, no, but the directing and establishing of military characteristics, yes. It was up to the Bureau of Ships to give us the specifications, to give us what we wanted. In other words, we specified the military characteristics, a certain type of guns, a certain number of guns, a certain type of equipment, a certain amount of landing craft, the double compartmentation, the ballasting, any special features that were military characteristics my office specified, but the Bureau of Ships gave us the specifications to give us what we wanted. The features were specified, and how they were put in the ships was up to the Bureau of Ships.

Q. What was your personal specific assignment and duty in the office with regards to specifications?

A. I was assigned to the division of the Office of Chief of Naval Operations known as Op 23. My desk was Op 23-E and later Op 23-E-1. Does that answer your question?

Q. What did you do as Op 23-E-1?

A. Well, as Op 23-E-1, in 1941, Op 23 was the cognizance desk for all naval auxiliaries, whether they were AP's, AO's, AK's, AC's, or whatnot. That desk also functioned for the [81] Chief of Naval Operations for the development of ship-borne landing craft—this was in 1941. I had been a member of the Naval Board for the testing of

(Testimony of Herman Barter.)

landing craft in 1939, when we made the original tests to get the best design. When I reported for duty in the office of the Chief of Naval Operations, then whatever correspondence or decisions or co-ordination or procurement of ships for landing craft fell to me as a part of that auxiliary desk. As the war developed, I was the Chief of Naval Operations member on the landing craft developing board, which was all ship-borne landing craft. I was the Secretary of the Navy member of the LVT Board from its beginning until the end of the war. That Board had the development of all amphibian tractors, like the alligators and water buffaloes.

In addition to the responsibility of my desk, my responsibility was advanced planning and procuring of landing craft, ship-borne and LVT's, to meet operation required, and in that I specified to the Bureau of Ships the monthly production of landing craft, both ship-borne and LVT's, that were to be built. I specified—do you want me to go into all this?

Q. Well——

A. You asked me what I did.

Q. I don't want to cut you off, Commander.

A. You asked me what I did.

Q. I think I asked you to get your particular assignment, [82] I think you have practically answered it. I will restate it now. Your assignment was concerned actually with landing craft, is that so?

A. All kinds of landing craft, from the LCN's

(Testimony of Herman Barter.)

to the LSD's, which was the largest, all APA's, AKA's, AGC's, LSV's, which was the old mine-layers that we could not do anything with and finally converted them to landing craft. In addition to the landing craft, I was the desk for the APA's—as the war progressed and one man or one desk could not handle all the naval auxiliaries, we branched out, and I took on the combative boats, another officer took on the amphibian tractors, another officer was assigned to the AKA's, et cetera.

Q. Now, if we take the landing of Attu, for instance, and the type of transports that were used at Attu, that had previously crossed your desk, had it not?

A. Yes, sir, and the one that sank up there, the "Middleton," I know all about that.

Q. You knew the "Middleton"?

A. Oh, yes.

Q. As far as the "Middleton," what armament did the "Middleton" have on her?

A. As I recall—of course, you must know that up to the first hundred APA's, ships that were later designated APA's, if you are familiar with that, we must have had 35 or 40 different types, and they were given numbers. The "Middleton," [83] I believe, was given the 20, and the APA's maybe 27, 26, something like that, and as I recall she had two five-inch guns, I think—I may be wrong on this—but this was about the best we could do at that time when we outfitted her. I believe two five-inch guns,

(Testimony of Herman Barter.)

I believe she had the one twin, one quad, two of them; because of the critical situation we could not get 40 millimeters; she carried landing craft, and I believe she had four whaling davits, two on each side. She was a ship that was already in being, as I recall, and we took over and did the best we could with her. We had three of that class.

Q. Now, as the war progressed from the first amphibian landing, the requirements to use landing craft and get troops ashore finally caused you to consider different specifications that went into the transport cargo ships, in order that they might perform their functions?

A. Characteristics. And I received my information through battle reports of operations, secret reports of fleet commanders or the commander responsible for the reports, they came across my desk—I mean all landing types, I don't mean the others, I mean the ship-borne landing types came across my desk *carte blanche*, as soon as a report came in and came to my desk, and in that way people in the fleet either praised the material or criticized and they pointed out the deficiencies of the equipment and what should be done about it, [84] and it was up to me to coordinate this information, and, if humanly possible, to eliminate some of the difficulties that were found in operations, and certainly as the war progressed every report was scrutinized and that was the reason that I said that this particular group of APA's, starting with 117, the VC-2 hull, was the absolute ultimate. It had the best anti-

(Testimony of Herman Barter.)

aircraft batteries—by that time the materials had become available, more plants were making them, the Russians and British were asking for them for lend-lease, and we had a chance to actually build into these ships—from the time the keel was laid—built into them what had been recommended to eliminate deficiencies that the forces and the fleet had reported to us in the months of the war.

Q. At that time you had had the advance of Saipan, the Marshalls, and of New Guinea and Leyte, the invasion of Leyte in the Philippines, and these ships were probably anticipated for use in the invasion of Japan; is that so?

A. These ships were designed for use in the advance and ultimate invasion of Japan. As I recall, Mr. Wanless of the Advanced Design of the Bureau of Ships, the first lay-out that he presented to me, as an example, had two five-inch guns on the stern, had a five-inch gun on the bow, because that was all we had been having in the anti-submarine armament, and the first change I made on that was to remove the five-inch in the bow and put a 40 millimeter quad up there, because we [85] expected more trouble from Kamikaze, I knew they were going to advanced islands, getting closer to the Japanese home base and Japanese planes, and these are the first ships we ever had quarter covered by a 40 millimeter twin, in addition to the quad on the bow.

But that was the result of knowing where these

(Testimony of Herman Barter.)

ships were going to operate and knowing what was needed from the reports of the commanders.

Q. To sum up, as all these ships came over to you the specifications were there, they were already specified from previous experiments and from the battle reports in the meantime, and the succeeding changes in specifications were the result of changes in the tactics in the war with the Japanese, as the advance on Japan was being made the biggest threats to the transports was the submarine, so you put a five-inch gun in the bow and maybe something else, but from the time of Leyte where you were getting closer to Japan, and with the practical destruction of the Japanese fleet, the submarine was no longer a threat, so you took one five-inch gun off the bow and you put some of the quads and the 40 millimeters, and the reason for that was because at that time the Japanese had no particular effective fleet, and it was more important to defend the ship from enemy aircraft than from submarines?

A. That is right, and that was one of the features we [86] included and were able to get.

Q. That was your function in regard to the specifications?

A. I call them military characteristics.

Q. Well, you performed the natural functions that your office was performing, to see that any ships gotten out were best equipped and designed to perform the function which they were going to be used for?

A. That is correct.

Mr. Collett: That is all.

(Testimony of Herman Barter.)

Mr. Pentz: That is all.

Mr. Walkup: Your Honor, I have located a reference to the deposition; I think I should ask a couple of more questions, if I may.

The Court: Yes.

Further Cross-Examination

By Mr. Walkup:

Q. Commander, are you qualified to tell us the meaning of the designation VC-2-S?

A. I believe so. VC-2 is Victory Cargo 2; S is steam, and it is my understanding that the VC-2 design, the C-2 meant a ship of certain dimensions, a certain—approximate certain cargo capacity. Now, the straight C-2—I mean the VC-2, the difference between the VC-2 and the C-2 is in a little finer lines, capacity about the same, but with the horsepower of the C-3, which gave the C-2 a greater speed, the VC-2 a greater speed than the straight C-2. [87]

Q. Now, referring to Plaintiff's Exhibit C, which is Addendum Number 2, Contract MCc-15762, the particular ships I referred to as design VC-2-S-AP5. You say that the V stands for Victory ship?

A. That is my understanding.

Q. The C stands for cargo vessel?

A. A cargo-type vessel of a certain capacity and dimensions, yes.

Q. And the 2 means, does it not, between 400 and 450 feet long, or do you know?

(Testimony of Herman Barter.)

A. I believe that is about right, yes.

Q. And the S refers to steam propulsion?

A. That is my memory, yes.

Q. And the propulsion of these APA's was the same as in all of the Victory cargo ships, was it not? There was no different engines put in them?

A. Oh, no; oh, no, they had the basic C3 engines. The horsepower of the—the C-3 was a larger cargo vessel and had larger engines to give them a certain speed. It was my understanding that in this design the Maritime Commission fined the hull down a bit—by “fining” I mean taking some of the beam out—and I think used larger engines, which gave the vessels an additional horsepower over a straight C-2, which would give it more speed than a straight C-2.

Q. Now, it is true, then, is it not, that there were the [88] same engine facilities in the cargo vessels as in these APA's, which was the modification of the cargo vessel with some naval features?

A. Well, I think I stated before it was my understanding the basic hull and engines—and I mean basic hull, which means the outside structure—I don't mean the interior arrangement and engines—were the same, but, as I pointed out, there was additional generator capacity required, additional refrigerator capacity required, the galley facilities, messing facilities, double compartmentation, ballasting, and all that built in and specified in these vessels.

No. 12766

United States
Court of Appeals
for the Ninth Circuit.

JOHN URQUHART BIRNIE, an Individual Doing Business as Birnie Electric Company, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corporation,

Appellants,

vs.

THE PERMANENTE METALS CORPORATION, a Corporation, and UNITED STATES MARITIME COMMISSION,

Appellees.

Transcript of Record
In Three Volumes
Volume II
(Pages 289 to 594)

Appeal from the United States District Court,
Northern District of California,
Southern Division.

No. 12766

United States
Court of Appeals
for the Ninth Circuit.

JOHN URQUHART BIRNIE, an Individual Doing Business as Birnie Electric Company, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corporation,

Appellants,

vs.

THE PERMANENTE METALS CORPORATION, a Corporation, and UNITED STATES MARITIME COMMISSION,

Appellees.

Transcript of Record
In Three Volumes
Volume II
(Pages 289 to 594)

Appeal from the United States District Court,
Northern District of California,
Southern Division.

(Testimony of Herman Barter.)

Q. The designation "VC-2-S-AP5," that is a Maritime Commission designation, is it not?

A. Oh, yes.

Q. Prepared by the Maritime Commission, rather than the Navy? A. Yes.

Q. Do you personally know what the Maritime Commission AP-5 meant?

A. A means auxiliary, P means personnel; the combination is usually referred to as transport, and the 5 purely—all I ever knew that it meant that they had used 1, 2, 3, 4 prior to these vessels, and when they were building these for the Navy, to be used by the Navy, to be built for combative transports, 5 was the next number that had not been used for the AP's, and they used that purely as if drawing a corresponding [89] designation, I imagine.

Q. Commander, in answering as to the meaning of APA, is it not true you have just given me the Naval meaning of it, rather than what the Maritime Commission meant by it?

A. Well, you are probably correct. AP really means transport, AP, auxiliary personnel——

Q. You don't personally know what the Maritime Commission meant by that designation, do you?

A. On the AP that is correct.

Q. Now, you mentioned a Mr. Wanless. Is that Ivan Wanless of the United States Maritime Commission, Preliminary Design Section?

A. I don't know him by the name of Ivan, but it was Mr. Wanless in the design of Maritime Commission billeted in Washington, yes.

(Testimony of Herman Barter.)

Q. He worked with you, did he, in designing these Victory cargo ships the Maritime Commission would change to meet requirements?

A. I don't believe he worked with us. Admiral Vickery came over—I was also a member of the Auxiliary Vessels Board—going back here for the four years—which you probably know was the board that cleared for the Navy the taking over of any ships for naval use or setting up requirements, and the legal machinery for either building auxiliary vessels or vessels of that type, and Admiral Vickery was over at that [90] board meeting, I am quite sure, when it was decided that these ships would be the ones that would be built for combat transports, and I recall that was—oh, probably somewhere around the 10th of October, 1943, Admiral Vickery went back, I am sure, and started the work on the preliminary designing of what had to be done, and I believe I met Mr. Wanless or with Mr. Wanless about the 30th of October, 1943.

Mr. Walkup: I move that the part of the answer be stricken, anything other than as to Mr. Wanless. The question was whether or not he worked with Mr. Wanless on working out the features of this vessel.

The Court: Motion denied.

A. We told Mr. Wanless what we wanted; Mr. Wanless had his draftsman prepared as soon as possible to meet what he thought we needed.

Q. (By Mr. Walkup): Is it not true that in working with Mr. Wanless you had in mind the

(Testimony of Herman Barter.)

return of these vessels after the war to cargo-carrying functions and accordingly in any changes that were made the modifications were kept to a minimum so as not to destroy the value of the vessels for rehabilitation to a cargo vessel when the Navy had finished with the vessels?

A. That wasn't my memory, no, sir. I can give you the biggest that you probably are referring to, which I believe was the Baxter out of Baltimore, as an example that we converted during this war under the same line of requirements, but we did not [91] hold it to these vessels. I don't recall in Baltimore of ships that were built like that the Navy had to take any conversion features—I had one ship where to maintain what you are talking about they wanted to put one-fourth of the embarked troops below decks, so far below decks that the ship's refrigeration was the deck above, and before the ships were even completed or the refrigeration was in—they wanted to put the refrigeration in the decks below and the troops above that, and the chief of Naval operations specified that no troops be put in that deck even if that area had to be carried as a void and another cargo hold, higher hold, would be used to accommodate the additional troops.

I do know that at certain times that was one of the things we had to contend with, but I have no knowledge of any necessity of that on these ships, because, as I said before, they were the 1945 model,

(Testimony of Herman Barter.)

and we got into the ships the things that made these the ideal combat ships for the forces afloat.

Q. Your answer somewhat answers my question. In other words, is it not a fact there was some friction between the Maritime Commission and the Navy because the Maritime Commission wanted to keep these vessels readily convertible to cargo vessels after the war and the Navy was primarily concerned in getting naval features in them for the war period?

A. The vessels under consideration as a part of this suit I would say no. I gave you the story on the other vessel [92] which was in the 90 class—either the 90, 91 or 92, but I am saying as far as these particular vessels are concerned I would say no. I recall no controversy or anything of the sort in reaching the features in them. Of course, the engine room was placed in the same place and the basic machinery, the basic hull was the same, that is correct.

Q. But as far as your personal knowledge goes you recall no such dissension between the Navy and the Maritime Commission?

A. On these particular vessels, no. We had it on plenty of them, and we had it, as I say, when you want to put one-fourth of the troops in space four decks down.

The Court: You have told us about that.

Q. (By Mr. Walkup): Commander, now it is true, is it not, that all vessels constructed after 1941

(Testimony of Herman Barter.)

had a degausse system on them by the Maritime Commission?

A. I think the degausse went in in the spring of 1941, wasn't it, or the latter part of 1940, and any ships going into certain areas certainly had to be degaussed.

Q. Was the degaussing system on ships during wartime kept on a cargo vessel as well as on a naval vessel?

A. Yes, that is correct.

Q. And a voice tube system was standard equipment on a cargo ship as well as a naval ship, was it not?

A. I would say maybe on that. We have got into sound power phones. The voice tubes might be there and might not be there. [93] They cause quite a lot of trouble.

Q. Mechanical telegraph system was a component part of the Victory cargo ships, was it not?

A. Oh, yes, and they had steering wheels to steer them with. That was the same on both ships.

Q. I don't mean to appear to be facetious, Commander, I am referring to specific items of work Mr. Birnie did on these vessels, and his work as shown by the subcontract which I just mentioned relating to installing degaussing system——

A. Yes.

Q. ——which you say was not limited to vessels used only by the Navy.

Installing voice tube, which is a feature of a cargo vessel as well as a naval vessel?

A. Oh, yes.

(Testimony of Herman Barter.)

Mr. Pentz: Just a moment. I wish to object to this line of questioning because it is not material to this case as to whether the particular items that Mr. Birnie furnished were of a naval character. The issue in this case is as to whether or not the vessels themselves were naval vessels, and it is true a naval vessel may have some of its features the same as a commercial vessel, and therefore it is not important as to whether Mr. Birnie's particular items were either naval or not naval. The question is whether the vessels themselves were naval vessels. [94]

The Court: Overruled.

Mr. Walkup: Another item Mr. Birnie was to install was a mechanical telegraph system. It is true, is it not, that the Victory cargo ship with those modifications that your department required has a mechanical telegraph?

A. Every vessel must have a mechanical telegraph, certainly.

Q. Would the same be true as to mechanical wireways?

A. Well, I am not sure if I know what you mean by that. Do you mean the pipe conduits for wires to go through, is that what you mean?

Q. Well, this refers to the wireways, to install same on that vessel, "said fabrication to be done at the contractor's plant." I assume that you would be familiar with the term "wireways" on a vessel, more so than I would.

A. I can tell you this: If it means that wires go

(Testimony of Herman Barter.)

through a conduit, either pipe or a metal conduit for fire protection from shorts, or something like that, I imagine that is standard equipment on any ship, and if that is what you mean that could be on any vessel.

(Recess.)

Mr. Walkup: I have no further questions, your Honor.

Mr. Pentz: No further questions.

The Court: That will be all, then, Commander.

The Witness: Thank you. [95]

Mr. Pentz: Your Honor, at this juncture I propose to introduce a series of letters, correspondence between the Maritime Commission and the Navy Department in the main. I have in my file photo-static duplicates of these letters, duplicates of those that are already in the depositions. I have reference to their particular designators in the depositions, and I presume we might offer these into evidence in a number of ways: I could offer my duplicates as being a part of the record, or I could read them in, or I presume the clerk could take the duplicates and give them the same designators as in the depositions. I would certainly want to pursue the manner you would recommend.

The Court: I have no objection to putting the duplicates in, if you wish.

Mr. Pentz: Very well. That will be the easiest, it seems to me.

The first letter, and for Mr. Walkup's informa-

tion it is designated as Plaintiff's I in the deposition of Messrs. McDonald, Maher & Wanless, taken in Washington by the plaintiff about October 1st, 1947, a letter dated November 9, 1943, signed by William D. Leahy, Admiral, United States Navy, and is addressed to Rear Admiral E. S. Land, Chairman, United States Maritime Commission.

This is the letter which requests the Maritime Commission to construct 130 standard APA's, and I at this time offer that [96] in evidence as Defendant's Exhibit first in order, which I believe would be A, or will it be designated one?

Mr. Walkup: Your Honor, I would like to object to the introduction of that document, and, in order to save time, I could possibly make a class objection to a number of specific documents which I expect to follow, on the ground that this correspondence between the joint chiefs of staff and the Maritime Commission, or between the representatives of the Navy and the Maritime Commission is entirely incompetent, irrelevant, and immaterial, and that the court is faced here with a pure question of law as to whether or not these particular vessels were vessels constructed under the Vinson-Trammell Act, as that act has been interpreted by the Court decisions, by the regulations thereunder, and has been fully briefed in our pre-trial statement of position, the point was made in the pre-trial statement of position that objection would be made at the trial to these documents on that ground.

If the Court is willing and counsel is willing, instead of objecting to each of these letters as offered,

I make the running objection now to any of the series of letters or correspondence between the Joint Chiefs of Staff and the Navy and the Maritime Commission which counsel is about to offer as entirely incompetent, irrelevant, and immaterial.

The Court: It may be understood you have a running objection to this line of exhibits which are about to be [97] offered.

(The document referred to was marked Defendant's Exhibit Number 1.)

Mr. Mellin: I understand Mr. Walkup's position is not he objects to the fact they are copies——

The Court: No, as to the substance.

Mr. Walkup: That is correct.

Mr. Pentz. The next letter, for counsel's information, is letter designated in the plaintiff's depositions taken in Washington as Plaintiff's Exhibit N. It is dated December 6, 1943, is signed by E. S. Land, Chairman of the Maritime Commission, is addressed to the Secretary of Navy, and refers to Admiral Leahy's letter, Defendant's Exhibit 1, and sets forth the general plan of procuring these vessels, where they are to be built, and other features.

I offer that letter as Defendant's Exhibit 2.

Mr. Collett: If the Court please, I don't want to be guilty of an over-sight here. I would like the record to show——

The Court: Your objection is the same——

Mr. Collett: Yes, in behalf of the United States as the objections that were heretofore made by counsel for Permanente. Likewise, the same objection to run——

The Court: It will be understood.

Mr. Pentz: May it also be understood that these letters as they come in may be deemed to have been read into the record? [98]

The Court: Yes.

(The document last offered in evidence was marked Defendant's Exhibit 2.)

Mr. Pentz: The next letter is designated in Plaintiff's depositions taken in Washington as Exhibit H. It is dated December 10, 1943, it is signed by the Bureau of Ships, Navy Department, to the Chairman, United States Maritime Commission, and in substance acknowledges the receipt of the letter, our Exhibit 2, and notes its contents—takes cognizance of its contents.

I offer that letter as Defendant's Exhibit 3.

(The document referred to was marked Defendant's Exhibit Number 3.)

Mr. Pentz: The next letter is designated in Plaintiff's Washington depositions as Exhibit O. It is a letter dated December 11, 1943, sent by E. S. Land, Chairman, United States Maritime Commission, to the Secretary of Navy, and in that letter certain changes insofar as where the ships are to be built are reported.

That letter I offer as Defendant's Exhibit 4.

(The document referred to was marked Defendant's Exhibit Number 4.)

Mr. Pentz: The next letter is identified in Plaintiff's Washington depositions as Exhibit R. It is

a letter dated February 29, 1944, is signed by the Hon. Frank Knox, Secretary [99] of Navy, and is addressed to the Chairman, United States Maritime Commission, in which the Navy confirms an understanding relative to the receipt of ships.

That letter I offer as Defendant's Exhibit 5.

(The document referred to was marked Defendant's Exhibit Number 5.)

Mr. Pentz: The next letter is identified in Plaintiff's Washington depositions as Exhibit Q. That letter is dated June 3, 1944, is signed by E. S. Land, Chairman of the United States Maritime Commission, and is addressed to the Secretary of Navy. In that letter the Maritime Commission seeks the approval of the United States Navy that the Navy pay for the conversion features of these vessels.

I offer that letter as Defendant's Exhibit 6.

(The document referred to was marked Defendant's Exhibit Number 6.)

Mr. Walkup: Your Honor, in addition to the running objection I have to this testimony, I would not like to have my silence to be deemed as agreeing with counsel's description of these documents. I presume it is more for the convenience of the Court. The documents will speak for themselves.

Mr. Pentz: I almost took that for granted.

(The document referred to was marked Defendant's Exhibit Number 6, as above stated.)

Mr. Pentz: The next letter is identified in Plaintiff's [100] Washington depositions as Plaintiff's

Exhibit U. It is a letter dated July 3d, 1944, sent by the Hon. James Forrestal, Secretary of the Navy, to the Chairman of the United States Maritime Commission, and it in substance accepts the arrangement that the Navy pay for conversion features of these vessels.

I offer that as Defendant's Exhibit 7.

(The document referred to was marked Defendant's Exhibit Number 7.)

Mr. Pentz: The next letter is—was contained in the Defendant's deposition—that is, this deposition taken of Captain McShane in Washington as Exhibit 4, with its attachments 4-A and 4-B. That is a letter dated December 27, 1945, sent by H. Struve Hensel, Assistant Secretary of the Navy, to the Chairman of the United States Maritime Commission, in which the Navy requests that title to the vessels when listed be considered in the Navy without further act or deed, and in the enclosures, the vessels, the subject matter of this litigation, are listed.

I offer that letter as Defendant's Exhibit 8.

Mr. Walkup: If the Court please, I would like to enter a further objection to this particular document and to subsequent documents of the same class. This particular document is dated December 27, 1945. That relates to an agreement worked out between the Navy and the Maritime Commission some years after these vessels were actually constructed, and it [101] had nothing whatsoever to do with any arrangements in effect at the time the vessels were constructed.

What that boils down to, so the purpose of the objection will be clear, is that there was a series of negotiations between the Navy and the Maritime Commission as to the postwar disposal of the entire supply, and as this document and others of the same class which will be offered will show, the Maritime Commission wanted some vessels back, the Navy was willing to give certain vessels back, and as a matter of bargaining, as I read the documents, this arrangement for transfer of title of some of the vessels involved in this action to the Navy was worked out, but it was not in contemplation at any time that Mr. Birnie had anything to do with the performance of this sub-contract for Permanente Metals Corporation.

So, therefore, in addition to the other grounds previously stated as to such correspondence that it is incompetent, irrelevant, and immaterial, I want to point out that because of the date of this subsequent correspondence and acts after the fact—we will make a further objection on that ground, that these, if the others were material, certainly would not be.

The Court: Overruled.

(The document referred to was marked Defendant's Exhibit Number 8.) [102]

Mr. Mellin: Mr. Pentz, Defendant's 8 includes 4-A and 4-B.

Mr. Pentz: Oh, yes. May the record show that the document I have introduced as Defendant's Exhibit 8 includes the enclosures as identified in De-

fendant's Exhibit of Captain McShane as 4-A and 4-B. In other words, 4-A and 4-B in the deposition are included in Exhibit 8.

The next letter is identified in the Defendant's Captain McShane deposition taken in Washington as Defendant's Exhibit 5, and it is a letter signed by E. S. Land, Chairman of the Maritime Commission, addressed to the Hon. James Forrestal, Secretary of the Navy, wherein the request of the Secretary of the Navy in Defendant's Exhibit 8, as regards title to these vessels is accepted.

Mr. Walkup: I make the same objection here as to Defendant's Exhibit 8, your Honor.

The Court: Same ruling.

Mr. Pentz: I offer the letter as just described as Defendant's Exhibit 9.

(The document referred to was marked Defendant's Exhibit Number 9.)

Mr. Pentz: The next letter is identified in Captain McShane's deposition in Washington as Exhibit 3. It is a letter dated January 23, 1946, from the Chief of Naval Operations, United States Navy, to all bureaus and officers, Navy Department, [103] in which all bureaus and officers of the Navy Department are instructed to have their records reveal that the vessels in this litigation are Navy owned.

Mr. Walkup: I make the same——

Mr. Pentz: Might I just ask this, Mr. Walkup: That as an attachment to that letter just described is a list of our vessels in this lawsuit identified in Captain McShane's deposition as 3-A, and I would

like to have the record show that this letter will be deemed to include both 3 and 3-a of Captain McShane's deposition.

Mr. Walkup: I make the same objection.

Mr. Pentz: I offer that as Defendant's Exhibit 10.

Mr. Walkup: I make the same objection as to the two previous exhibits of the defendant, and wish to point out in support of the objection that certainly Permanente or the Maritime Commission could in no way be bound by the fact that in 1946, long after the event, the Navy Department, after acquiring title to the vessels by a trade with the Maritime Commission enters a list of vessels as Navy owned. That would certainly have no bearing on the issues of this lawsuit.

The Court: Same ruling.

(The document referred to was marked Defendant's Exhibit Number 10.)

Mr. Pentz: Your Honor, that is the conclusion of the correspondence, and I wish at this time to read in a portion of [104] the deposition of Captain McShane.

The Court: Very well.

DEPOSITION OF CAPTAIN McSHANE

(The following portions of the deposition referred to was read, Mr. Pentz reading the questions, and Mr. Mellin reading the answers:)

Mr. Pentz: For the benefit of counsel, I begin to read from Page 3 of their deposition in the middle of the page:

(Deposition of Captain McShane.)

“Q. State your name.

“A. Ralph Edward McShane.

“Q. Please state your rank.

“A. Captain, United States Navy.

“Q. Captain McShane, are you present at this time and place in response to a subpoena duces tecum issued by the District Court of the United States for the District of Columbia, dated September 15, 1947, in the action entitled *The Permanente Metals Corporation, a corporation, plaintiff, vs. John Urquhart Birnie and Massachusetts Bonding and Insurance Company, defendants and cross-complainants*, being Civil Action File No. 26215-S in the United States District Court, Northern District of California, Southern Division, which subpoena is addressed to the Secretary of the Navy or such other person as he shall designate on his behalf?

“A. I am.

“Q. Captain, are you the person who has [105] been designated by the Secretary of the Navy to appear on his behalf and to answer such questions on his behalf as may be propounded to you during this deposition?

“A. I have been designated by the Judge Advocate General of the Navy, acting in behalf of the Secretary, to testify in connection with the production of certified copies of records and documents.

“Q. How long have you been on active duty in the United States Navy, Captain?

“A. Including my service as midshipman, since

(Deposition of Captain McShane.)

July, 1917. As a commissioned officer continuously since June, 1920.

“Q. And your status as a commissioned officer of the United States Navy continues at the present time? A. Yes, sir.

“Q. At the present time, to what division of the United States naval organization are you attached?

“A. With the Bureau of Ships, Navy Department.

“Q. Captain McShane, in accordance with naval procedures, what are the principal steps taken by the Navy when a vessel intended for its use is ready for delivery to the Navy?

“A. The normal procedure upon delivery is to have the vessel formally accepted by a naval officer, frequently the commandant of the district in which the [106] vessel is delivered. There is the signing of a formal document when the vessel is procured from a private contractor. Shortly after it is formally delivered, the vessel is placed in commission, as a normal practice, if the vessel is intended to be placed in active service.

“Q. Now, what does the Navy do, as a customary procedure, in connection with identifying any such vessel?

“Mr. Walkup: By ‘such vessel,’ to what are you referring?

“Mr. Pentz: Referring to the preceding question.

“A. When it is placed in commission, it is added into a list of ships. Prior to its commissioning it

(Deposition of Captain McShane.)

has been assigned an identification number and a designating symbol and a name.

“Q. Captain McShane, does the United States Navy maintain a record of the names and navy numbers and designation symbols of the vessels it possesses from time to time? A. Yes, sir.

“Q. Will you tell us, please, the general nature of the record that you have referred to?

“A. The names and symbol numbers for all the ships in the possession of the Navy are recorded and [107] are published periodically in a standard document called the Naval Vessels Register.

“Q. Now, Captain, the record you have described as being called the Naval Vessels Register is an official document or record of the United States Navy, is it not? A. Yes, sir.

“Q. Is the Naval Vessels Register in the custody and control of the Secretary of the Navy?

“A. Yes, sir, in the sense that all official naval records are in his custody.

“Q. Have you prepared an excerpt from the Naval Vessels Register pertaining to the vessels named in the subpoena duces tecum in response to which you are present here today?

“A. Yes, sir.

“Q. Have you it in your possession?

“A. Yes, sir.

“Q. May we see it, please?

“A. Yes, sir. (Hands document to Mr. Pentz.)

“Mr. Pentz: Mr. Labofish, I hand you a paper headed ‘Excerpts from: Naval Vessels Register,

(Deposition of Captain McShane.)

Navships 18-1-8 dated 1 July, 1947,' and ask that you please mark it for us for identification as Defendants' Exhibit 1. (So marked.) [108]

"Q. Captain, is the paper identified as Defendants' Exhibit 1 a true, correct, and accurate copy of a portion of the Naval Vessels Register?

"A. Yes, sir.

"Q. At this time, Mr. Labofish, I desire to offer Defendants' Exhibit 1 into evidence and as a part of the record in this proceeding."

Mr. Walkup: To which I object on the ground it is incompetent, irrelevant, and immaterial. As will be shown by the exhibit, it is a document read by the Navy bearing date of July 1st, 1947, having no bearing upon the facts existing at the time of the performance of the work by Mr. Birnie for Permanente Metals Corporation, and certainly not binding on Permanente in its contractual relations with Mr. Birnie at that time.

The Court: Overruled.

Mr. Pentz: I offer at this time a document which is a duplicate of Exhibit 1 in Captain McShane's Washington deposition entitled, "Naval Vessels Register, Navships, 18-18 dated 1 July, 1947," as Defendant's Exhibit 11.

Mr. Walkup: Same objection.

The Court: Same ruling.

(The document referred to was marked Defendant's Exhibit Number 11.)

(Deposition of Captain McShane.)

Mr. Pentz: (Reading:) [109]

“Q. Captain, I direct your attention to Defendants’ Exhibit 1, more particularly the first vertical column thereof on the left. What is the meaning of the letters APA contained in that column?”

Mr. Walkup: Pardon me, your Honor. In order to avoid objecting to practically every question from now on which relates to the Captain explaining the exhibit just introduced and the Navy meaning of the various symbols thereon, I would like to have a running objection.

The Court: You may have a running objection to such questions.

Mr. Walkup: And I would like to state further that the theory of the objection is that what the Navy did with the vessels after they acquired them from the Maritime Commission was completely beyond Permanente’s control. We built the vessels for the Maritime Commission. If the Maritime Commission subsequently delivered them to the Navy and the Navy did certain things with them, we would not be bound by that.

Mr. Collett: Of course, the defendant Maritime Commission joins in the same objection.

The Court: It will be understood you join in all the objections Mr. Walkup makes.

(The reading of the deposition was continued, as follows:)

“A. The first A indicates auxiliary, the P indicates transport, and the second A indicates attack.

(Deposition of Captain McShane.)

The [110] three letters are commonly used to mean attack transport.

“Q. Directing your attention from left to right to the second vertical column of numbers appearing on Defendants’ Exhibit 1, please tell us the meaning of those numbers?

“A. Those numbers are serial numbers within a given lettered classification, and in conjunction with the lettered classification identify a specific ship.

“Q. Captain, when you referred to lettered classification in your last answer, did you have reference, in the case of this Exhibit 1, to the classification APA? A. Yes, sir.

“Q. Directing your attention, Captain, to the vertical column third from the left as contained on Defendants’ Exhibit 1, I ask you to tell us the meaning of the words that appear there in the vertical column.

“A. Those are the names of the individual ships.

“Q. You refer to the United States official Navy name? A. Yes, sir.

“Q. Likewise the lettered classification under the heading Type is the official United States [111] Navy classification of the vessels bearing the names in the third column?

“A. May I hear that again?

“Question repeated by stenographer.

“A. Yes, sir.

“Q. And likewise, Captain, the numbers appear-

(Deposition of Captain McShane.)

ing in the second vertical column from the left hand side are the official Navy numbers of the vessels whose names appear in the third column?

“A. Yes, sir.

“Q. Now, Captain, directing your attention to the lettering and numbers immediately following the vessel name and separated by slant lines, and appearing under the heading ‘Name’ in Defendants’ Exhibit 1, tell us, if you please, what those letterings and numbers mean?

“A. Those are the identification numbers in the Navy records identifying the Maritime Commission’s hull number.

“Q. Now, directing your attention to the vertical column fourth from the left hand side of Defendants’ Exhibit 1 under the heading ‘Vessel Status,’ tell us, if you please, the meaning of those letters.

“A. May I refer to some notes?

“Mr. Pentz: I have no objection. [112]

“Mr. Walkup: It is all right with me.

“Mr. Pentz: May I suggest, Captain, when you give us the benefit of your statement in this regard, that we refer to the vessels’ names, in order to properly identify the symbols that we are asking you to describe?

“A. Yes, sir. APA 204 Sarasota, out of commission in reserve.

“Q. May I interrupt you, Captain? In other words, that is the meaning of the letters RES/OC?

“A. Yes, sir. APA 205 Sherburne, RES/OC, meaning out of commission in reserve. APA. 206

(Deposition of Captain McShane.)

Sibley, RES/OC, meaning out of commission in reserve. APA 207 Mifflin, RES/OC, meaning out of commission in reserve. APA 208 Talladega, RES/OC, meaning out of commission in reserve. APA 209 Tazewell, RES/OC, meaning out of commission in reserve. APA 210 Telfair, RES/OC, meaning out of commission in reserve. APA 211 Missoula, RES/OC, meaning out of commission in reserve. APA 212 Montrose, RES/OC, meaning out of commission in reserve. APA 213 Mountrail, RES/OC, meaning out of commission in reserve. APA 214 Natrona, RES/OC, meaning out of commission in reserve. APA 215 Navarro, RES/OC, meaning out of commission in reserve. APA 216 Neshoba, RES/OC, meaning out of commission in reserve. APA 217 New Kent, ACT, meaning [113] active. APA 218 Noble, ACT, meaning active. APA 219 Okaloosa, ACT, meaning active. APA 220 Okanogan, ACT, meaning active. APA 221 Oneida, RES/OC, meaning out of commission in reserve. APA 222 Pickaway, ACT, meaning active. APA 223 Pitt, DI/WSA meaning vessel transferred to War Shipping Administration—Maritime Commission for disposition. APA 224 Randall, ACT, meaning active. APA 225 Bingham, DI/RET, meaning vessel returned to original owner."

The Court: Recess.

(Thereupon an adjournment was taken until 2:00 o'clock p.m., this date.) [114]

Thursday, February 23, 1950—2:00 P.M.

(The reading of the deposition of Captain

(Deposition of Captain McShane.)

Ralph Edward McShane was continued, as follows, Mr. Pentz reading the questions and Mr. Mellin the answers:)

“Q. Captain, of the vessels you have named, are there any of them not presently in the possession of the United States Navy?

“A. According to the records, APA 225, the Bingham, has been transferred to the War Shipping Administration or the Maritime Commission for disposition. All others, according to the record, are in the possession of the Navy.

“Q. Captain McShane, does the United States Navy maintain a record concerning the source of its authorization in having procured APA 204 the Sarasota, APA 205 the Sherburne, APA 206 the Sibley, APA 207 the Mifflin, APA 208 the Talladega, APA 209 the Tazewell, APA 210 the Telfair, APA 211 the Missoula, APA 212 the Montrose, APA 213 the Mountrail, APA 214 the Natrona, APA 215 the Navarro, APA 216 the Neshoba, APA 217 the New Kent, APA 218 the Noble, APA 219 the Okalossa, APA 220 the Okanogan, APA 221 the Oneida, APA 222 the Pickaway, APA 223 the Pitt, APA 224 the Randall, and APA 225 the Bingham? Now, do you still understand the [115] question, Captain?

“A. No, sir. May I hear the first part of it?”

Mr. Mellin: And may the record show there, your Honor, the stenographer reads the question, and the answer is:

“A. Yes, sir.

(Deposition of Captain McShane.)

“Q. Captain, does the Navy maintain a record of the source of the appropriation of money for payment concerning the acquisition of the vessels I have named in the preceding question?

“A. Yes, sir.

“Q. Are the originals of the records you refer to presently under the control and custody of the Secretary of the Navy? A. Yes, sir.

“Q. Do you have in your possession a copy of the records you have mentioned? A. Yes, sir.

“Q. Would you let us see it? I have it here. Will you identify for our benefit the record that you mentioned?

“A. I have here excerpts from a compilation called Quarterly Combined Authorization Report, which is identified by the Navy file Navships (1851). This excerpt was taken from the copy of that compilation marked Report No. 40, dated 1 January, 1947.” [116]

Mr. Pentz: And, for the purpose of the record, I have in my hand that paper which corresponds to Exhibit 2, as mentioned in the next sentence.

“Q. Captain McShane, is the paper identified as Defendants’ Exhibit 2 a true, correct, and accurate copy of excerpts from the original records from which the entries are taken? A. Yes, sir.

“Q. Is the paper marked Defendants’ Exhibit 2 authenticated? A. Yes, sir.

“Q. Also in that respect, Captain, is not Defendants’ Exhibit 1 likewise authenticated?

“A. Yes, sir.

(Deposition of Captain McShane.)

“Mr. Pentz: At this time, Mr. Labofish, I would like to introduce into evidence heretofore marked for identification as Defendants’ Exhibit 2. (So marked.)

“Q. Captain, I note the following language contained at the top of Defendants’ Exhibit 2: Act of December 17, 1943, Auxiliary Portion of Public Law 204, 2,500,000 Tons. What relationship, if any, do those words I have read you have with respect to the vessels whose names and numbers are contained in the vertical column located beneath those words?”

Mr. Walkup: Object to that, in addition to the running [117] objection previously noted, on the ground it calls for an opinion and conclusion of the witness as to the interpretation of a Navy document which speaks for itself.

Mr. Pentz: I can reply to that, your Honor. We are not trying to modify the terms of this document in any way, but the lettering that appears at the top of the names of our vessels does have in the Navy Department a particular significance, and we are not inquiring as to the law, we are only inquiring as to the significance those words have as far as the Navy records are concerned.

The Court: Overruled.

(The reading of the deposition was continued, as follows:)

“A. The words you have read identify the public

(Deposition of Captain McShane.)

law which granted authority for the acquisition or construction of the ships in question.

“Q. I note the following language contained at the top of Defendants’ Exhibit 2: P.L. 216 Appropriation Act 12/23/43, 1,640,303 tons Clearance, Actual Obligations, and ask you what relationship, if any, do the words I have just read you have with respect to the vessels whose names and numbers are contained in the vertical columns located beneath those words on Defendants’ Exhibit 2?”

Mr. Walkup: I make the same objection, your Honor——

The Court: Same ruling. [118]

Mr. Walkup: ——as calling for an opinion and conclusion.

(The reading of the deposition was continued, as follows:)

“A. Those words identify the appropriation act which made the initial appropriation of funds for the purpose of undertaking the acquisition or construction of the vessels in question.”

Mr. Pentz: Your Honor, at this time, I offer in evidence the document which is identical to Defendant’s Exhibit 2 in the deposition of Captain McShane as Defendant’s Exhibit 12.

The Court: Received.

Mr. Walkup: Our running objection——

The Court: Yes.

Mr. Walkup: ——extends to that.

(The document referred to was marked De-

(Deposition of Captain McShane.)

fendants' Exhibit Number 12.)

Mr. Pentz: No further questions.

Mr. Walkup: I would like to read part of the cross-examination, commencing on Page 13.

Mr. Mellin: Do you want me to read the answers, Mr. Walkup?

Mr. Walkup: Thank you.

Mr. Mellin: Page 13?

Mr. Walkup: Yes.

(The reading of the deposition of Captain McShane was continued, Mr. Walkup reading the questions and Mr. Mellin the [119] answers, as follows:)

“Q. Captain, you testified concerning the Naval Vessels Register. Does the fact that a vessel is listed in the Naval Vessels Register necessarily imply that that vessel is owned by the United States Navy? A. I don't know, sir.

“Q. Do you know of your own knowledge whether or not every vessel listed in the Naval Vessels Register is in fact a vessel title to which is at the time of listing in the United States Navy?”

Mr. Pentz: I object to the form of the question as calling for a conclusion of the witness.

The Court: Overruled.

(The reading of the deposition was continued, as follows:)

“A. I do not know, sir, of my own knowledge.

“Q. On Defendants' Exhibit 1 the term

(Deposition of Captain McShane.)

Navships appears. That is a designation of the Navy, is it, Captain? A. Yes, sir.

“Q. That is a coined word of the Navy, coined by the Navy Department itself? A. Yes, sir.

“Q. Do you know, Captain, whether or not the designation Navships indicates that this is a publication of the Bureau of Ships? [120]

“A. It is ordinarily used as a file designation to indicate publications of the Bureau of Ships of the Navy Department.

“Q. Do you know of your own knowledge, Captain, when these particular vessels designated on Defendants' Exhibit 1 were first included in the Naval Vessels Register? A. No, sir.

“Q. The particular issue of the Naval Vessels Register that you have identified as Defendants' Exhibit 1 is the issue of 1 July, 1947?

“A. That is correct.

“Q. And how frequently is the Naval Vessels Register published? A. I don't know.

“Q. Do you know if the issue of 1 July, 1947, is the latest issue available?

“A. To the best of my knowledge it is.

“Q. I will call your attention to the numbers 18-1-8 appearing at the top of Defendants' Exhibit No. 1. Will you please state what those numbers designate? A. I do not know of a certainty.

“Q. What is your judgment on it, if you have any?

“A. My opinion is that it constitutes a file [121]

(Deposition of Captain McShane.)

designation by which the Naval Vessels Register is distinguished from other documents.

“Q. That is a Navy designation, in your opinion, to distinguish the Naval Vessels Register from other Navy documents?

“A. I would say more precisely from other Navships documents.

“Q. Now the term APA appearing on Defendants' Exhibit 1 is a designation coined or developed by the Navy Department, is it not?

“A. To the best of my knowledge, it is.

“Q. May I call your attention to the designation appearing on Defendants' Exhibit 1 bearing the name of each vessel, ‘MCV’ followed by a number in each case. Would you please state what the designation ‘MCV’ designates?

“A. It is my understanding that the MC means Maritime Commission, and that the V, I believe, refers to a type, but of that I am not certain.

“Q. That is a Maritime Commission as distinguished from a Navy Department designation, is it not?

“A. That is my understanding, yes, sir.

“Q. And the number following each such MCV designation is a Maritime Commission hull number, is it not, Captain? [122]

“A. That is my understanding, yes, sir.

“Q. Referring now to the column in Defendants' Exhibit 1 entitled ‘Status,’ which in turn has three subheadings under it, the status date is shown in the last column, the month being abbreviated by

(Deposition of Captain McShane.)

the first numeral and the year by the second numeral? A. Yes, sir.

“Q. Now those month and year designations on the first 13 vessels are January, 1947, and that is also true of the 18th vessel, whereas other vessels in the list have different dates. Can you explain the basis for the difference in the status dates on the various vessels?

“A. I am sorry. Will you please indicate what you mean by the difference?

“Q. I am getting at is simply this: Some of the vessels show the status date as January, 1947, some of the vessels show the status date as March, 1946, some show it as September, 1946, some as June, 1946, and some as April, 1947. Why is there a difference in the status dates listed?

“A. I cannot explain the reason why the vessels were placed in these various statuses. I do not know the reasons which dictated their having attained that status on that particular date. [123]

“Q. Then these status dates refer back to the date on which each particular vessel received the status which is shown in the column entitled Vessel status? A. Yes, sir.

“Q. Do you know the present status of any of the vessels shown on Defendants' Exhibit 1?

“A. Of my own knowledge I do not know the status at this instant other than is shown on Exhibit No. 1.

“Q. Does Exhibit No. 1 show the status of each of the vessels as of 1 July, 1947?

(Deposition of Captain McShane.)

“A. What I am trying to explain is the date of publication was 1 July, 1947, and this indicates the status at some time prior to that, at the time of the preparation of the data from which the publication was made. Do I make that clear, Mr. Walkup?

“Q. I am just trying to get it clear in my own mind. To further clarify it, take APA 204 on January, 1947. That vessel went into status RES/OC, which, according to your testimony, means out of commission in reserve. A. Yes, sir.

“Q. Now can you tell from this compilation, Defendants' Exhibit 1, whether APA 204 is still in that status, RES/OC? [124]

“A. As of this instant, Mr. Walkup, as of today?

“Q. Yes. A. No, sir.

“Q. Could you tell as of July 1, 1947, from this table that the status of APA 204 was as designated by the code RES/OC?

“A. It is possible that between the time the original data was prepared for publication and the first of July, 1947, a change had occurred.

“Q. Well, then, the status date in the last column on Defendants' Exhibit 1 refers to the time when a particular vessel attained the particular status specified in the column entitled Vessel Status opposite the status date for that vessel?

“A. Yes, sir.

“Q. What is meant by the code numbers appearing under Status under the heading Code?

(Deposition of Captain McShane.)

“A. Those numerals indicate a group of symbols, all of which have the same letters preceding the slant line. Is that clear?

“Q. Well, your statement is clear, but I cannot apply it to this register.

“A. Yes, sir. May I give an example? Code 1, for instance, embraces three kinds of status, which are designated ACT/IC, ACT/IS, and ACT/BL, each of [125] which defines a different category of active ship.

“Q. What are those letters following the diagonal line?

“A. IC means in commission, IS means in service, and BL means vessel building.

“Q. On the list of abbreviations under Vessel Status, none of those letters appear following ACT. Why is that?

“A. I can't explain that. I don't know.

“Q. What does Code No. 3 mean?

“A. Code No. 3 embraces six kinds of status.

“Q. What are the six kinds?

“A. The six are RES/IC, meaning in commission in reserve; RES/OC, meaning out of commission in reserve; RES/IS, meaning in service in reserve; RES/OS, meaning out of service in reserve; RES/DC, meaning decommissioned in caretaker status; RES/BL, meaning reserve vessel building.

“Q. We have one other code number left, Captain, so we may as well take it. Code No. 7.

“A. Yes, sir. It embraces two categories, sym-

(Deposition of Captain McShane.)

bolized DI/WSA, meaning vessel transferred to War Shipping Administration—Maritime Commission for disposition; DI/RET, meaning vessel returned to original owner.

“Q. Taking the symbol DI/WSA, which, according [126] to your testimony, signifies vessel transferred to WSA—MC, is that reference to WSA—MC an alternative designation, either the War Shipping Administration or the Maritime Commission?

“A. I don’t know for a certainty, Mr. Walkup.

“Q. The symbol DI/RET refers to return to the original owner? A. Yes, sir.

“Q. Does that refer to the original owner of the vessel in question? A. I assume that it does.

“Q. You have a list there of the meaning of these terms. Your list says nothing more than returned to original owner?

“A. That is all, yes, sir.

“Q. In the case of APA 225 shown on Defendants’ Exhibit 1, is there any way that you can tell from that compilation, Defendants’ Exhibit 1, to whom APA 225 was returned? A. No, sir.

“Q. Do you know of your own knowledge whether a vessel which had been transferred from the Maritime Commission to the Navy Department on a loan charter basis would be listed as a naval vessel in the Naval Vessels Register?

“A. I don’t know, sir. [127]

“Q. Referring now to Defendants’ Exhibit 2, is this exhibit also, that is, the original from which

(Deposition of Captain McShane.)

this constitutes excerpts, a publication of the Bureau of Ships of the Department of the Navy?

“A. Yes, sir.

“Q. And that is also shown by the designation Navships appearing on the exhibit, is it?

“A. Yes, sir.

“Q. And this particular exhibit constitutes excerpts from Volume No. 40 dated 1 January, 1947, of the Quarterly Combined Authorization Report?

“A. Yes, sir.

“Q. Is that the latest issue of that particular publication?

“A. To my knowledge it is, yes, sir.

“Q. Is that publication a quarterly publication as indicated by the title?

“A. I can only assume that it was at one time.

“Q. Do you know if it has been continued after 1 January, 1947?

“A. To the best of my knowledge it has not.

“Q. What is the extent of your knowledge on that subject?”

Mr. Pentz: Well, I object to that question. In the first place, the form is not sufficiently definite to permit [128] this witness to properly answer.

The Court: Overruled.

Mr. Mellin: I guess you will have to read another question.

Mr. Walkup: Yes.

(Continuing the reading of the deposition:)

“Mr. Walkup: I will reword the question.

“Q. Captain, you stated that to the best of your

(Deposition of Captain McShane.)

knowledge. Do you have any knowledge on the subject? A. Yes, sir.

“Q. What is your knowledge upon which you based your answer to the previous question?

“A. The compilation in question is not made under my immediate supervision, but elsewhere in the Bureau of Ships. I use the publication infrequently, and I am not in a position to state with certainty as to whether it continues to be published or not.

“Q. Referring to the column on Defendants' Exhibit 2, headed 'Source,' and particularly to the small letter a in parentheses appearing at the left side of the word 'Transfer,' each place that the word Transfer appears in that column, will you please state what is meant, if anything, by the small letter in a parentheses?

“A. I believe it refers to a footnote appended to the entire document, and the significance of the a [129] I do not know at this time.

“Q. I call your attention, Captain, to the small letter a in parentheses appearing in the lower right hand corner of Defendants' Exhibit 2, followed by the words 'Under Loan Charter Prior to 1/14/46.' Does that small a in parentheses, followed by the language just quoted by me, constitute the footnote a to which you have just referred?

“A. I assume it does, yes, sir.

“Q. Will you please explain the meaning of the language quoted in footnote (a)?

(Deposition of Captain McShane.)

“Mr. Pentz: I object to the question as calling for a conclusion of the witness.”

The Court: That apparently is withdrawn.

(The reading of the deposition was continued, as follows:)

“Mr. Walkup: Captain, you have testified, have you not, concerning, the meaning of the various language appearing on Defendants’ Exhibit 2?

“A. Yes, sir.

“Q. You are familiar, are you not, with the meaning of the language appearing on portions of this Defendants’ Exhibit 2, other than the language appearing following the item which you have now identified as footnote (a) to the report from which this Defendants’ Exhibit 2 is an excerpt? [130]

“A. May I hear that question again, sir? I got lost in the context of it.

“(Stenographer reads question.)

“A. Yes, sir.

“Q. Are you familiar with the meaning of the language following footnote (a) appearing on the exhibit, or are you not?

“A. I am familiar with the fact that vessels were acquired on a loan charter basis. The legal technicalities of a loan charter I am not familiar with.

“Q. Captain, is it your understanding then that the footnote (a) which modifies the word Transfer each time the word Transfer appears under the column entitled Source, indicates that prior to Jan-

(Deposition of Captain McShane.)

uary 14, 1946, each of the vessels designated was under loan charter agreement from the United States Maritime Commission to the United States Navy Department?"

Mr. Pentz: I object to the form of the question as calling for a conclusion of the witness.

The Court: Overruled.

(The reading of the deposition was continued as follows:)

"A. I would interpret those words to mean what you have said.

"Q. What is the meaning, Captain, of the abbreviations, numbers, and diagonal lines appearing under [131] the heading Date of Contract or Acquisition on Defendants' Exhibit 2?

"A. As used in connection with ships acquired by contract from private shipbuilders, under those contracts made directly between the Navy and a private shipbuilder, it means the date of signing of the formal contract to build the ship. I interpret the date when used in conjunction with the word Acquisition to mean the date upon which the Navy formally acquired the ship.

"Q. Can you tell from that list, Captain, whether a particular date refers to the date of a contract, or on the other hand to the date of acquisition?

"A. Only by reading it in conjunction with the notation under the column headed Source.

"Q. Can you tell in this case by reading the date

(Deposition of Captain McShane.)

abbreviation in conjunction with the word Transfer under the heading Source?

“A. I am not sure of that. I believe there is a technicality involved here, in that the vessels in question were acquired by the Navy prior to the date of formal transfer, but I am not sure of that.

“Q. Do these dates, to your knowledge, shown in the column Date of Contract or Acquisition, refer to any contract date? [132]

“A. I think not. I may not have a clear understanding of contract, Mr. Walkup. In my terminology, my familiarity with shipbuilding contracts, a contract to me means a document in shipbuilding for the procurement of a ship from a private shipbuilder, and in that sense I would assume that the dates here do not refer to that form of contract. If the process of acquisition legally constitutes a contract, then I would assume that date would apply to a contract in that sense.

“Q. I take it from that, then, Captain, that your judgment is that the dates shown under the column entitled Date of Contract or Acquisition refers rather to a date of acquisition in each case than to the date of any shipbuilding contract?

“A. Yes, sir.

“Q. Calling your attention to the abbreviations, numbers, and letters appearing under the heading Directives on Defendants' Exhibit 2, will you please state the meaning of those abbreviations, numbers, and letters?

“A. Yes, sir. Aux. means auxiliary. Ves. means

(Deposition of Captain McShane.)

vessels. Bd. means Board. Rpt. means report.

“Q. Did you want to interpret the balance of that, Captain, please?

“A. The entire sentence first appearing under the word Directives means Auxiliary Vessels Board Report [133] No. 84 of January 10, 1944, modified by Chief of Naval Operations' restricted letter Serial 1S4P421 of January 23, 1946.

“Q. Is that document still restricted, to your knowledge? A. Yes, sir.

“Q. And by restricted you mean it is unavailable for use outside the Navy Department?

“A. Yes, sir.

“Q. Would you please interpret for us the abbreviations appearing at the bottom of the column entitled Directives?

“A. Yes, sir. That would be interpreted to mean Auxiliary Vessels Board Report No. 84 of January 10, 1944.

“Q. Is that report restricted?

“A. Yes, sir.

“Q. That refers, does it not, to the same report as the report referred to above in the same column?

“A. Yes, sir.

“Q. Is it the report, Captain, that is restricted, or is it the letter that is restricted?

“A. Both are what are classified documents, meaning they are of restricted or a higher classification.

“Q. Referring to the vessel listed on [134] Defendants' Exhibit 2 as APA 225, Bingham, MCV

(Deposition of Captain McShane.)

hull 573, do you know the meaning of the term Loan Charter Basis appearing in the column headed Source?"

Mr. Pentz: I object to the form of the question as calling for the conclusion of the witness.

The Court: Overruled.

(The reading of the deposition continued, as follows:)

"A. Only insofar as I have described before my knowledge of the significance of loan charter.

"Q. Do you know of your own knowledge, Captain, whether the directive referred to on Defendants' Exhibit 2 as Auxiliary Vessels Board Report No. 84 of 1/10/44 represents the first official action of the Navy Department with reference to the acquisition of the vessels shown on the exhibit?

"A. I do not know, sir.

"Q. This Quarterly Combined Authorization Report is a report setting forth the Navy Department designations concerning the various vessels listed thereon, is it not? A. Yes, sir.

"Q. A document of the Navy Department as distinguished from a report of any other branch of the Federal Government? A. Yes, sir. [135]

"Q. Captain, what information, if any, do you have, of your own knowledge, showing that the funds appropriated by Public Law 216, Appropriation Act 12/23/43, were for the purpose of carrying out the authorization for construction and acquisition of ships under Public Law 205?"

Mr. Pentz: No objection.

(Deposition of Captain McShane.) ·

(The reading of the deposition was continued, as follows:)

“A. I have read the appropriation act in question, and to the best of my memory it refers specifically to the authorization act, namely, Public Law 204.

“Q. Then you are basing your testimony on the effect of Public Law 204 and Public Law 216 on your interpretation of those laws?”

Mr. Pentz: No objection.

(The reading of the deposition was continued, as follows:)

“A. I have discussed the general question of the significance of authorization acts in conjunction with appropriation acts a number of times in connection with my present duties, and I would say from that point of view only I have some further knowledge than is in the text of the specific laws mentioned here. I would further say that in my opinion I could not qualify as an expert in the significance of these or any other laws in their technical aspects.” [136]

Mr. Walkup: At this time, your Honor, I move to strike the answers given by the witness on Pages 9 and 10 of the deposition, and I will specify which ones I refer to. I refer to the questions and answers starting with just below the center of the page:

“Q. Captain, I note the following language,” et cetera. That question and answer, and the next question and answer, on the ground it now appears

(Deposition of Captain McShane.)

on cross-examination that the Captain concedes he has no knowledge other than the wording of the laws themselves, and he does not feel qualified as an expert on the interpretation of those laws.

Mr. Pentz: My reply to that, if your Honor please, is the fact that to have produced a document here without any explanation as to the relationship between the language at the top of the document and the vessels below would have been to have tendered a document without any evidence as to the connection between the two. Now, the Navy Department, which is true of any other person or agency, is presumed to operate pursuant to law. Now, certainly where we show that that Public Law appellation is at the top of the instrument, the interpretation thereby is that it refers to the ships below, and certainly we have a right to assume that the Navy did pursue what was legal, and that particular law refers to the ships below.

Now, naturally Captain McShane is in no position to [137] interpret the law, but he is in the position to state that insofar as that particular record is concerned, Public Law 204 refers to the ships listed below.

His testimony was only introduced by me on that subject for a limited purpose of showing that so far as that document is concerned one referred to the other.

The Court: If that is your limited purpose, I want it to remain in for that limited purpose. Motion denied.

(Deposition of Captain McShane.)

(The reading of the deposition was continued as follows:)

“Q. Referring now to Defendants’ Exhibit 3, the references (a) and (b) in the letter of January 23, 1946, are set forth in other parts of the exhibits introduced in direct testimony, are they not?

“A. Yes, sir.

“Q. This particular letter, Defendants’ Exhibit 3, is a letter from one branch of the Navy Department to another branch of the Navy Department, is that correct? A. Yes, sir.

“Q. And the reference in paragraph No. 2 to the correction of records refers, does it not, to the correction of Navy Department records?

“A. That is correct.

“Q. Referring now to Defendants’ Exhibit 4, reference is made in the first line to letter Serial 06P421, dated 29 October. Do you have a copy of that letter, [138] Captain?

“A. I don’t have a copy here.”

Mr. Walkup: To save time, I might state here to the Court that I requested the Captain to produce that letter of 29 October, 1944, and he did so at a continued hearing of the deposition, and I intend to introduce that on rebuttal, so I believe we can now skip part of the examination.

Skipping, then, down to Page 25, about the middle of the page:

(The reading of the deposition was continued, as follows:)

(Deposition of Captain McShane.)

“Q. Referring now to Defendants’ Exhibit 5, is the letter of October 29, 1945, referred to on line two of that exhibit, the same letter of October 29 referred to in line one of Defendants’ Exhibit 4?

“A. I can only assume from the context that it is.

“Q. Do you know, Captain, if there was a reply from the Secretary of the Navy to Admiral Land to the letter of January 14, 1946, which is Defendants, Exhibit 5? A. I do not know, sir.”

And the Captain then agreed to make a search for that, and produce it at the same continued hearing of the deposition.

I have no further questions.

Mr. Pentz: No questions.

Now, your Honor, insofar as the presentation of the [139] Defendants’ case in chief is concerned, it will be limited by my offer to introduce a few of the admissions under Rule 36, which I will proceed to do at this time.

I am now referring to the defendants’ request for admissions, of which there are four in the record, but this one was filed November 24, 1948:

“Question 1: With respect to the photostatic document entitled ‘Ship Construction Progress, Permanente Metals Corporation, Richmond Shipyard Number 2,’ attached hereto as Exhibit A,”—and I have here available a copy of that exhibit A——

“(a) The attached copy is a true, correct, and accurate copy of an original record of the Per-

(Deposition of Captain McShane.)

manente Metals Corporation, Richmond Shipyard Number 2;

“(b) That the original record, of which the attached is a copy, was made and compiled by The Permanente Metals Corporation, Richmond Shipyard Number 2, in the ordinary course and performance of its business;

“(c) The original record and the attached copy fairly and truthfully represent the facts which it purports to say.

“Answer: Admitted, except as follows.

“Admits that the original record and the attached copy fairly and truly represent the facts which it purports to say, except that such record and copy in the [140] form set forth does not disclose the date of preparation thereof, and does not purport to represent the date on which the Navy Hull numbers or the names of the ships were assigned, or by whom such Navy Hull Numbers or names of the ships were assigned.”

At this time I would offer in evidence as Defendants' Exhibit 13 a duplicate of Exhibit A, as is described in that particular request for admissions.

Mr. Walkup: Now, as to this exhibit, your Honor, my previous running objection would not cover, and the only objection that I have to the introduction of this document is that which was stated in the answer to the request for admission, it might be mis-read unless it was shown when it was prepared, because what it is is a report made up at some date which is not shown on it.

The Court: Can't you agree upon the date?

Mr. Pentz: No, I don't think either one of us knows the date, but it was stipulated that it truly represents the facts it purports to state, and it states the hull numbers, it states the names, it states the dates of the keel laying. That is the important thing, is when were these keels laid.

Mr. Walkup: I will stipulate the date of keel laying is correct.

The Court: That is your purpose?

Mr. Pentz: The second purpose is to show the date of [141] delivery to the Maritime Commission.

The Court: And that date is shown?

Mr. Pentz: Yes.

Mr. Walkup: There is no objection on that ground. I wouldn't want to create the impression that Permanente produced these Navy numbers, Navy names, and keel laying dates, because this is on their records.

The Court: It will be received.

(The document referred to was marked Defendants' Exhibit Number 13.)

Mr. Pentz: The next bit of evidence is not in logical sequence to this material, but I would like to introduce two letters as they are answers to letters that Mr. Walkup has placed in evidence. I wish to offer this as Mr. Birnie's answer first to the letter heretofore admitted into evidence and designated plaintiff's O.

I am reading now from my requested admissions filed November 24, 1948, question number two:

“With respect to the copy of a letter dated April 4, 1947, addressed to The Permanente Metals Corporation and signed by Elliott H. Pentz for Hill, Morgan & Farrer, attached hereto as Exhibit B”——

and I have here a copy of that Exhibit B.

“(a) The attached copy is a true, correct, and accurate copy of an original letter.” [142]

“Answer: Admitted.”

“(b) The original letter, of which the attached is a copy, was received by the Permanente Metals Corporation on or about April 4, 1947, in the usual and ordinary course of United States mail.”

“Answer: Admitted.”

At this time I offer that letter into evidence as Defendants’ Exhibit 14.

(The document referred to was marked Defendants’ Exhibit Number 14.)

Mr. Pentz: And the other letter has to do—it is a reply to the letter Mr. Walkup introduced as Plaintiff’s N.

Reading from the same request for admissions, question four:

“With respect to the copy of a letter dated March 20, 1947, addressed to the United States Maritime Commission and signed by John Urquhart Birnie, attached hereto is Exhibit D”——

and the letter I have is a true and correct copy of Exhibit D.

“(a) The attached copy is a true, correct, and accurate copy of an original letter.”

“Answer: Admitted.”

“(b) The original letter, of which the attached is a copy, was received by the United States Maritime Commission on or about March 20, 1947, in the usual and [143] ordinary course of United States mail.”

“Answer: Admitted.”

And at this time I offer into evidence that letter as Defendants' Exhibit 15.

(The document referred to was marked Defendants' Exhibit 15.)

Mr. Pentz: Now, your Honor, there are a few more left, about four.

I have now reference to my request for admissions following this action on November 24, 1948, to identify the document:

“Question 4: That”—I have used the words “That the aforesaid ships,” but that refers to my interpolation—“That the ships designated as United States Maritime Commission hulls numbers 552 through 573 were delivered into the control, custody, and sole right of possession of the United States Navy at the date and at the time shown opposite each under the columns headed ‘Actual Delivery’ on the aforesaid document entitled ‘Ship Construction Progress.’ ”

“Answer: Denies that said ships were delivered by the Permanente Metals Corporation into the control, custody, and sole right of possession of the United States Navy, and in this connection avers and alleges that such ships were delivered by the Permanente Metals [144] Corporation upon com-

pletion into the control, custody, ownership, and sole right of possession of the United States Maritime Commission, and that the date and time shown opposite each ship under the columns headed 'Actual Delivery' on the aforesaid document entitled, 'Ship Construction Progress' refers to and sets forth the date and time that each ship was actually delivered by The Permanente Metals Corporation to the United States Maritime Commission, as aforesaid, and that the date upon which each ship was actually delivered by the United States Maritime Commission into the control, custody, and sole right of possession of the United States Navy is set forth opposite each ship under the column headed 'Date of Contract or Acquisition' in the document entitled 'Excerpts from Quarterly Combined Authorization Report—Navships (1851) Report Number 40, 1 January, 1947,' a copy of which is attached as Exhibit 2 to the Deposition of Ralph Edward McShane, 'taken in the City of Washington, District of Columbia, on or about the 20th day of September, 1947,' a copy of which said deposition, together with the exhibits thereto, is in the possession of defendants and cross-complainants."

I wish to state that that establishes that the dates as set forth under the title "Acquisition" in Defendants' Exhibit 13—I am sorry, 12—shows the dates of delivery from the [145] Maritime Commission to the Navy.

I read from the same Request for Admissions, Paragraph 7:

"That each and all of the aforesaid ships, after

delivery into the control, custody, and sole right of possession of the United States Navy, was officially commissioned as a ship of the United States Navy."

"Answer: Admitted."

And following that, Paragraph 8:

"That with the exception of the U.S.S. Bingham, Navy Number APA-225, each and all of the afore-said ships remained in the control, custody, and sole right of possession of the United States Navy from the date of delivery of each to the United States Navy until or about July 1, 1947."

"Answer: Admit that with the exception of the U.S.S. Bingham, Navy Number APA-225, Maritime Commission Hull Number 573, and the further exception of the U.S.S. Pitt, Navy Number APA-223, Maritime Commission Hull Number 571, each and all of said ships remained in the control, custody, and sole right of possession of the United States Navy from the date of delivery of each by the United States Maritime Commission to the United States Navy until on or about July 1, 1947, and in this connection alleges and avers that the U.S.S. Bingham, Navy Number APA-225, Maritime Commission Hull Number 573, [146] was returned to the United States Maritime Commission by the Navy Department in the month of June, 1946, and that the U.S.S. Pitt, Navy Number APA-223, Maritime Commission Hull Number 571, was transferred by the Navy Department to either the United States Maritime Commission or the War Shipping Administration in the month of April, 1947."

Mr. Walkup: Your Honor, I take it that our running objection to the Navy testimony would cover the requests for admissions. For that reason I have not made a specific objection.

The Court: Very well, so understood.

Mr. Pentz: I read from the same report for admissions, Paragraph 9:

“That legal title to each and all of the aforesaid ships was transferred by the United States Maritime Commission to the United States Navy on or about January 14, 1946.”

“Answer: Admits that legal title to each and all of said ships, with the exception of the U.S.S. Bingham, Navy Number APA-225, Maritime Commission Hull Number 573, was transferred by the United States Maritime Commission to the United States Navy on or about January 14, 1946.”

Reading from the same Request for Admissions:

“That each and all of the aforementioned ships were derived from and a part of the 130 stranded APA'S [147] more particularly described and referred to in letter dated November 9, 1943, from William D. Leahy, Admiral, United States Navy, in his capacity as Chief of Staff, to the Commander in Chief of the Army and Navy, and on behalf of the joint Chiefs of Staff, addressed to Rear Admiral E. M. Land in his capacity as Chairman of the United States Maritime Commission, a copy of which is in the possession of the Plaintiff and Cross-Defendants as Exhibit I in the deposition on behalf of Plaintiff and Cross-Defendant, The Permanente Metals Corporation, taken in the City of

Washington, District of Columbia, on or about the first day of October, 1947.”

Which is in our present record, the Admiral Leahy letter, which is defendants’ Exhibit 1.

“Answer: Admitted, subject, however, to the qualification that each and all of said ships were originally derived from and a part of the Maritime Commission Design VC-2-S-AP2 vessels, including Maritime Commission Hull Numbers from 552 to 573, inclusive, which the Permanente Metals Corporation contracted to construct for the United States Maritime Commission by contract MCo-15762 between the United States Maritime Commission and the Permanente Metals Corporation under date of April 22, 1943, which contract was executed prior to said letter dated [148] November 9, 1943.”

And now referring to the same request for admissions, Paragraph 12 on the last page—and, Mr. Walkup, do you have that before you? Do you agree with me there is a typographical error there?

Mr. Walkup: I don’t know that there is, but if there is——

Mr. Pentz: Well, I will read it and you will see what I mean: Reading from Question 12:

“The estimated cost of the conversion of all of the aforesaid ships for use by the United States Navy, aggregated \$34,213,000, which sum of money the United States Maritime Commission was reimbursed in full from funds of the United States Navy.”

Mr. Walkup: That is true.

Mr. Pentz: (Reading:)

“Answer: Admits that the estimated cost of the conversion features only of said ships for use by the United States Navy aggregated \$34,213,000, which sum of money the United States Maritime Commission was reimbursed in full from funds of the United States Navy.”

And the last question, 13:

“That the actual cost of converting each and all of the aforesaid ships for use by the United States Navy was ultimately paid for in full from funds by the United States Navy.” [149]

“Answer: Admitted, with the qualification that ‘the actual cost of converting each and all of the aforesaid ships for use by the United States Navy’ refers only to the cost of the conversion features, and does not include any part of the cost of the ‘base vessel,’ and in this connection alleges and avers that the total cost of the said ships to the United States Maritime Commission was \$89,500,000, of which the said conversion costs amounted to only \$34,213,000, and the remainder of the total cost was the cost to the United States Maritime Commission of the ‘base vessel’ without the conversion features.”

Now, your Honor, if I may have a moment to review my file, I believe that concludes our case.

The Court: Do you wish a recess?

Mr. Pentz: Yes, if you will, please.

(Recess.)

Mr. Pentz: I only have one statement to make, your Honor, and that is so that there will be no misunderstanding that the record does reflect the reading of my Request for Admissions and the An-

swers, that will be deemed in the record of the case?

The Court: Very well.

Mr. Pentz: We close our case for the defendant.

Mr. Walkup: In rebuttal, your Honor, I would like to—— [150]

Mr. Collett: Pardon me——

Mr. Walkup: Pardon me, Mr. Collett.

Mr. Collett: If the Court please, I think for the purposes of the record at this time, we—the Court will recall a motion to dismiss this action was filed as to the cross defendants, United States Maritime Commission and Joseph K. Carson, Raymond S. McKeough, Admiral William W. Smith, Granville Mellon and Richard Parkhurst, as members of the United States Maritime Commission.

There has never been any service effected on any of the members of the Maritime Commission, and I move to dismiss on that ground alone.

The Court: You mean on the individuals?

Mr. Collett: On the individuals, yes.

That the action be dismissed as to the Maritime Commission, I again renew the motion that was filed as to the Maritime Commission, that it is not a proper action against the Maritime Commission; if there is any action, it would be against the United States of America as a proper party, and that further as to the United States of America there has been no case made here by any of the evidence on behalf of the cross complainants that has been now presented to the Court. There is no cause of action stated against the United States as such or the Maritime Commission, and upon all the grounds

previously urged, the motion is renewed that the cross [151] complaint should be dismissed as to the United States Maritime Commission.

Mr. Pentz: I have no objection to the dismissal of the individual defendants.

The matter of the retention of the Maritime Commission as a party defendant was gone into quite thoroughly at the time the motion was made.

The Court: Oh, yes. I don't recall if I made a ruling. It seems to me there is a proper action on the cross complaint here.

Mr. Pentz: The theory was that if there were to be a judgment in favor of Permanente Metals, since it is stipulated that the money that they might recover would be the sole property of the Maritime Commission, that their presence here is necessary, because if Permanente were here alone there would only be a dollar damage, so to speak, and thus there would be no action against the Maritime Commission.

The Court: Well, the motion to dismiss the individual members of the Maritime Commission is granted. Otherwise it is denied.

Mr. Walkup: Now, your Honor, at this time I want to offer in evidence deposition of Ivan Joyce Wanless, which was taken on behalf of the plaintiff and cross defendant, Permanente Metals Corporation, in Room 4809, Department of Commerce, in Washington, D. C., on October 3d, 1947, pursuant to a stipulation, [152] and thereafter continued and completed at a subsequent date.

Mr. Mellin: If your Honor please. we have no

objection to this deposition; we have intention of offering all of the remainder of that same deposition, which is not offered by Mr. Walkup. Unless Mr. Walkup and the Court wishes the entire deposition read into the record, we will stipulate it may all go in and be deemed read, together with the exhibits.

Mr. Walkup: What are you going to do on the question of rulings? There are a number of objections.

Mr. Mellin: The objections may be deemed to be—I mean withdrawn.

Mr. Walkup: All your objections are deemed withdrawn?

Mr. Mellin: That is right.

Mr. Walkup: Let me check further here as to my objections to cross-examination.

Mr. Collett: It begins at Page 156.

The Court: Yes. Where does the cross-examination begin?

Mr. Walkup: The cross-examination begins at Page 187, your Honor.

(Mr. Walkup looks through deposition.)

Mr. Walkup: I intended to read the whole deposition, your Honor, but the question is I want to make certain on these objections.

Well, that stipulation is satisfactory to me, your Honor, with the understanding that this can be physically copied into [153] the record by the reporter and be a part of the record as though actually read in court.

The Court: So understood.

Mr. Walkup: Now, at this time I offer in evidence the exhibits—or exhibit, rather, to the deposition of the witness Ivan Wanless which appears and is marked as Plaintiff's Exhibit HH in the back of the deposition, which is a certified copy of the Design Filing System dated October 1st, 1947, of the United States Maritime Commission as it appears on file in the records of the Commission, and it is referred to and further identified in the testimony of the witness, Ivan Wanless.

Mr. Pentz: No objection, your Honor. I understood it would be stipulated all the exhibits attached to that deposition would be deemed introduced.

Mr. Walkup: Well, I am now offering this one so there is no question it will be made a part of the testimony of the witness.

(The document referred to was marked Plaintiff's Exhibit T.)

Mr. Walkup: At this time also, your Honor, I desire to read into the record, unless a similar stipulation can be arrived at, the testimony of the witness John Bassette Maher, taken on behalf of the plaintiff and cross defendant, The Permanente Metals Corporation, in Room 4705, Department of Commerce, Washington, D. C., October 1st, [154] 1947.

Mr. Pentz: The same stipulation as to the testimony of Mr. Maher.

Mr. Walkup: I would like, your Honor, to review the cross-examination as to objections. It will save considerable time of the Court if I take a few minutes to do that, rather than having to read it.

The Court: Very well.

Mr. Walkup: Now, I would like to state, your Honor, as to the testimony of the witness, Ivan Wanless, and also as to this testimony, we deliberately did not offer this as a part of our case in chief, but because of your Honor's ruling as to the admissibility of certain other evidence, we are now offering it in rebuttal, and our position is this is likewise immaterial. And we took the deposition to have it for rebuttal only, if your Honor ruled as he did.

(Mr. Walkup looked through the deposition.)

Mr. Walkup: On further thought, it has occurred to me, your Honor, with reference to both of these depositions it may be I would desire to move to strike some of the answers given on cross-examination, or at least portions of them. I would hate to, in the interest of saving time, fail to move to strike some matter which should be stricken, if there is any such.

The Court: Didn't you note it as the depositions were taken?

Mr. Walkup: The objections were reserved and the motions— [155] I made some objections at the time as to the form of the question and other matters, but not necessarily all objections were made at the time.

The Court: Well, I see frequently where you make objection as to the form and otherwise, and the question was reframed.

Mr. Walkup: Yes. I think as to any objections

that are in there, there would be no prejudice to my client by withdrawing them. However, I am wondering as to the motions to strike testimony which has been given, and I haven't read through all the answers with that in mind.

The Court: Well, if you wish to do that, why don't you take a reasonable period of time to make any of those motions, and you might make them in writing and then I will rule on them.

Mr. Walkup: That will be very acceptable, your Honor, and I can serve counsel with a copy. There may not be any, but I do not want in the interest of time——

The Court: Five days? Will that be sufficient time?

Mr. Walkup: Yes, your Honor.

Now, also as to the testimony of the witness John Bassette Maher, I offer at this time the Plaintiff's exhibits introduced at the time of the deposition, which would be Plaintiff's V to the deposition, Plaintiff's Exhibit W to the deposition, Plaintiff's Exhibit X to the deposition, Plaintiff's [156] Exhibit Y to the deposition, Plaintiff's Exhibit Z to the deposition, Plaintiff's Exhibit AA to the deposition, Plaintiff's Exhibit BB to the deposition, Plaintiff's Exhibit CC to the deposition, Plaintiff's Exhibit DD to the deposition, Plaintiff's Exhibit EE to the deposition, Plaintiff's Exhibit GG to the deposition. I would like to check on the whereabouts of Exhibit FF. That was introduced in another part of the testimony of a different witness.

The Clerk: Did you want to mark those as one exhibit, or separately?

Mr. Walkup: I think they should probably have consecutive letters besides.

The Clerk: That is in which deposition, Maher?

Mr. Walkup: The deposition of Maher.

The Clerk: The one marked V would be U; W is V; X is——

Mr. Pentz: Mr. Clerk, will you give those a little slower so I can mark mine? V is——

The Clerk: V is marked as U; W is marked as Plaintiff's V; X is marked as Plaintiff's W; Y is marked as Plaintiff's X; Z is marked as Plaintiff's Y; AA is marked as Plaintiff's Z; BB is marked as Plaintiff's—well, that would be sort of confusing—or, did you want to do it that way? Well, we could mark it AA; that would be Plaintiff's AA as to the one marked BB. As to CC, it would be BB; as to DD, it would be CC; as to EE, it would be DD; as to GG, it would be EE, all Plaintiff's exhibits. [157]

I guess that straightens it out.

(The documents referred to were marked as indicated by the Clerk.)

Mr. Walkup: Now, I will have some other exhibits to introduce, your Honor, in rebuttal, and with the same understanding that Permanente contends they are immaterial but are offered in rebuttal in view of your Honor's ruling on the evidence position. I had intended to use the rest of the afternoon in reading these depositions, but if I can

have about five minutes, I may save the Court's time in organizing them.

The Court: Very well.

(Recess.)

Mr. Walkup: At this time, your Honor, I offer in evidence a number of delivery certificates covering vessels under Maritime Commission contract MCo-15762, certified to by the United States Maritime Commission, all of which are included under one certificate.

There was one certificate the Commission could not find in its records, and it was agreed it could be included as under this certificate, and although the Commission was not able to locate the original of that, we have a certified photostatic copy.

Mr. Pentz: No objection. Are those just for our twenty-two vessels? [158]

Mr. Walkup: No, this includes all the vessels under MCo-15762. The purpose of the introduction is to show that all the vessels constructed under that contract by Permanente Metals Corporation were delivered to and receipted for by the United States Maritime Commission, and for the text of the delivery receipt certificate as to each vessel. In other words, to further establish our point that we did not deliver these vessels to the Navy Department, but we delivered them to the Maritime Commission.

Mr. Pentz: I will stipulate to that, and why encumber the record? In other words, make the record far larger than it should be otherwise? I have never contended otherwise, that they were not delivered to the Maritime Commission.

Mr. Walkup: Possibly we could offer one of these certificates for the text; the text is the same on each, except for identifying the vessel. They are all the same type of certificate at delivery of the vessels that were entered into between Permanente Metals and the Maritime Commission at the time of delivery.

To save encumbering the record, I am very willing to introduce this one just to show the text of the receipt. The others are identical, except for the fact that they cover other vessels and other dates of delivery.

Mr. Pentz: May I see the certificate?

(Mr. Walkup handed a document to Mr. Pentz.) [159]

Mr. Pentz: I have no objection at all.

Mr. Walkup: Then we will introduce this one singly which relates to Hull Number 527, with the understanding we have similar certificates for each vessel included under Maritime Commission Contract MCo-15762.

(The document referred to was marked Plaintiff's Exhibit FF.)

Mr. Walkup: I should state that the hull numbers referred to run from Maritime Commission Hull Number 525 through 601 consecutively.

At this time I desire to introduce in evidence Exhibit G to the deposition of R. L. McDonald, which is a deposition of the Assistant Secretary of the Maritime Commission, taken in Washington, D. C., on behalf of Permanente Metals Corporation. This

exhibit is likewise introduced on the same basis as the other rebuttal exhibits of Permanente. We do not consider it material, but we offer it in rebuttal to the testimony to which we objected.

Mr. Pentz: That is the one for at least six ships for hospital ships. I understood that we had stipulated that all of the exhibits in that deposition may be deemed a part of the record. I have no objection to it.

Mr. Walkup: I would merely like to introduce it as an exhibit.

(The document referred to was marked Plaintiff's Exhibit GG.) [160]

Mr. Walkup: I next offer in evidence Exhibit P to the deposition of R. L. McDonald, with the same understanding that it is offered in rebuttal of the evidence, and that except for that fact we wouldn't offer it. We consider it irrelevant.

(The document referred to was marked Plaintiff's Exhibit HH.)

Mr. Walkup: I next offer Exhibit S to the deposition of R. L. McDonald upon the same understanding as stated with reference to the last exhibit.

(The document referred to was marked Plaintiff's exhibit II.)

Mr. Walkup: I next offer in evidence Exhibit 6 to the deposition of Captain Ralph Edward McShane, with the same understanding that it is offered in rebuttal solely.

Mr. Pentz: In connection with Exhibit 6, I

would like to make this statement, that I would have made it a part of my case except that the defendant's exhibit 8 already in this record cancelled that letter he is speaking about, and for that reason I didn't offer it.

Mr. Walkup: That is correct, except it is referred to in the previous exhibits introduced, and I want to show that it was eliminated from consideration.

(The document referred to was marked Plaintiff's Exhibit JJ.)

Mr. Walkup: I next offer in evidence Exhibit C to the [161] deposition of R. L. McDonald, with the same understanding, that it is offered in rebuttal solely, as previously stated.

(The document referred to was marked Plaintiff's Exhibit KK.)

Mr. Walkup: I next offer in evidence Exhibit 7 to the deposition of Captain Ralph Edward McShane, with the same understanding, that it is offered solely in rebuttal, as above stated.

Mr. Pentz: In connection with Exhibit 7, I make the same statement, that I did not offer it because it was cancelled by my Exhibit 8, which is already in the record.

(The document referred to was marked Plaintiff's Exhibit LL.)

Mr. Walkup: I offer in evidence next Exhibit D to the deposition of R. L. McDonald, upon the same understanding as stated with reference to the previous exhibits.

(The document referred to was marked Plaintiff's Exhibit MM.)

Mr. Walkup: I offer in evidence Exhibit A to the deposition of R. L. McDonald, upon the same basis as previously stated, that it is offered in rebuttal only.

(The document referred to was marked Plaintiff's Exhibit NN.)

Mr. Walkup: I offer in evidence Exhibit B to the deposition of R. L. McDonald, upon the same basis as stated [162] with reference to the previous exhibits.

(The document referred to was marked Plaintiff's Exhibit OO.)

Mr. Walkup: I offer in evidence Exhibit K to the deposition of R. L. McDonald, upon the same basis as stated with reference to the previous exhibits.

(The document referred to was marked Plaintiff's Exhibit PP.)

Mr. Walkup: I offer in evidence Exhibit L to the deposition of R. L. McDonald, upon the same basis as stated with reference to the previous exhibits.

(The document referred to was marked Plaintiff's Exhibit QQ.)

Mr. Walkup: I offer in evidence Exhibit O to the deposition of R. L. McDonald, upon the same basis as stated with reference to the previous exhibit.

The Clerk: Plaintiff's RR.

Mr. Walkup: I offer in evidence——

Mr. Pentz: O is already in the record.

Mr. Walkup: I beg your pardon?

Mr. Pentz: O is already in the record.

Mr. Walkup: That may be. I went over this hastily, and if we have a duplication——

Mr. Pentz: Defendant's Exhibit 4 is Plaintiff's Exhibit O in the deposition. [163]

The Clerk: All right, we will cancel that RR, then; is that all right?

Mr. Walkup: It is what number?

Mr. Pentz: Defendant's Exhibit 4 in the record in this case is the same thing as Plaintiff's Exhibit O in the deposition.

Mr. Walkup: Yes. I offer in evidence Exhibit T of the deposition of McDonald, with the same understanding as to the previous exhibits which were offered in rebuttal only.

(The document referred to was marked Plaintiff's Exhibit RR.)

Mr. Pentz: I wish to make this statement in connection with that letter, I feel it not pertinent, because it is some letter returned to be rewritten; that is all that was.

Mr. Walkup: That may be so, but to have the letters together—other letters refer to the letters that have been cancelled, and that is my purpose of offering the complete set of correspondence, even though some letters were cancelled and rewritten.

I would like to offer in evidence certain other exhibits to the deposition of R. L. McDonald, but the exhibits without the text of the deposition are meaningless, so that it would be necessary, in order to explain these exhibits, to read certain portions of the deposition of R. L. McDonald.

Now, I suggested to counsel as an expedient to save the [164] time of the Court that within the same five-day period that I am going to write to the Court about any objections or motions to strike the testimony of the witnesses Wanless and Maher, that I could write to the Court outlining the brief portions of the deposition of R. L. McDonald that I desire read into the record, in order to explain the remaining exhibits which I desire to introduce, and at the same time I could specify the deposition, number of the exhibit, and the pages of the testimony of R. L. McDonald which refer to them.

Except for that, the testimony of R. L. McDonald relates largely to identifying——

The Court: Suppose we have the understanding you may do that in five days, and opposing counsel may make any objections he cares to make within the five days, or designate any further portions of the testimony he desires in the record. Is that satisfactory?

Mr. Walkup: That is entirely satisfactory, your Honor.

Mr. Pentz: That is satisfactory.

Mr. Walkup: Now, based upon that understanding, then, the Plaintiff and Cross-Defendant Permanente Metals rests its case.

The Court: Any sur-rebuttal?

Mr. Pentz: No sur-rebuttal.

The Court: Now, of course, Gentlemen, I understand your respective theories of the parties. You have a mass of [165] evidence here, including depositions. I don't know whether you wish to set forth your respective viewpoints on that evidence or not; I don't know that there is any occasion to go into the legal problems any further, but there may be factual questions that you want to call specifically to my attention. Are there or are there not?

Mr. Pentz: Not in my case, your Honor. I feel it pretty well speaks for itself.

Mr. Walkup: Our position is essentially a legal position, your Honor——

The Court: I appreciate that.

Mr. Walkup: Yes, and if your Honor decides against us on that point, we would still desire to point out the pertinent bits of evidence that we think still permits us to recover.

Now, I have done that briefly in the pre-trial statement of position, stating that although we deemed certain evidence immaterial, if your Honor considers it we still think it confirms our position.

The Court: Do you care to amplify that by any memorandum?

Mr. Walkup: I think it might be desirable, because it is such a mass of evidence for the Court to thumb through and——

The Court: I think it would be helpful if you could set forth at least the highlights.

Mr. Walkup: Yes.

The Court: —in this evidence. And how long will it [166] take to do that after you get this evidence in? The evidence will be in in ten days then.

Mr. Walkup: Well, my particular situation is one that Mr. Pentz is familiar with, because it came up when the case was set for trial. I am starting with a jury trial next week that will take three weeks, and am leaving for the east, with the understanding that if we have to get a continuance or something that would accommodate me in that regard.

The Court: What is your suggestion, then, as to the time you wish?

Mr. Walkup: If I could have a week after returning from the east, which would be about, say, by the end of March, if that is not too long? If it is——

The Court: Of course, the case has been pending here for a long time. I believe it was one of Judge St. Sure's cases originally, was it not?

Mr. Walkup: Yes.

The Court: And I believe another month won't be much out of the way.

Mr. Pentz: We just hope that because of your Honor's crowded calendar that you don't forget about our case.

The Court: Well, you gentlemen know what we have been up against here lately.

Well, if you have to the end of March, then how much time would you want, Mr. Pentz, to file yours? [167]

Mr. Pentz: Well, two weeks would be more than ample.

The Court: I will try not to take more than two weeks after that.

Mr. Pentz: I think that this, so that we have an understanding, that this, in effect, amounts to a written argument in regard to this testimony?

The Court: Yes, on the factual situation. I don't think you need to go into the legal questions any further, unless you feel you should amplify that further. I think you have covered that very comprehensively in your briefs.

Then the plaintiff will have until the end of March, that is the 31st day of March, and you will have to the 15th day of April in which to file your closing memorandum, and then the matter will stand submitted.

Mr. Walkup: Thank you, your Honor.

Mr. Pentz: Thank you.

[Endorsed]: Filed April 28, 1950. [168]

[Title of District Court and Cause.]

DEPOSITIONS ON BEHALF OF PLAINTIFF
AND CROSS-DEFENDANT, THE PERMA-
NENTE METALS CORPORATION, A COR-
PORATION

Stipulation Changing Time and
Place for Taking Deposition

It Is Hereby Stipulated, this 1st day of October, 1947, between Bruce Walkup, one of the attorneys of record for plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, and Elliott H. Pentz, one of the attorneys of record for the defendants and cross-complainants, John Urquhart Birnie, an individual doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, a corporation, that the deposition of the Chairman of the United States Maritime Commission, Washington, D. C., or such person or persons as he may designate in his behalf, heretofore noticed to be taken on September 26, 1947, commencing at 10:00 o'clock a.m., Eastern Daylight Time, before John P. Labofish, Notary Public, or some other duly qualified notary public at Room 4704, Commerce Building, Washington, D. C., and thereafter continued by written stipulation to September 29, 1947, at the same time and place, and thereafter continued by written stipulation to September 30, 1947, at the same time and place, shall be taken on October 1st, 1947, commencing at 10:00 o'clock a.m., Eastern Standard Time, before said

Notary Public, or some other duly qualified Notary Public at Room 4852, Commerce Building, Washington, D. C. or in such other room, if any, to which said deposition may be adjourned.

It is further stipulated, that the aforesaid deposition shall otherwise be taken in all respects in the manner heretofore noticed, excepting as to the time and place thereof as heretofore stipulated herein.

BRUCE WALKUP,
WILLIS S. SLUSSER,
THELEN, MARRIN, JOHNSON
& BRIDGES.

By /s/ BRUCE WALKUP,
Attorneys for plaintiff and cross-defendant, The
Permanente Metals Corporation, a Corporation.

HILL, MORGAN & FARRER,
TINNING & DeLAP,
MELLIN AND HANSCOM.

By /s/ ELLIOTT H. PENTZ,
Attorneys for Defendants and Cross-Complainants,
John Urquhart Birnie, an Individual Doing
Business as Birnie Electric Company, and
Massachusetts Bonding and Insurance Com-
pany, a Corporation.

Appearances:

BRUCE WALKUP,

On behalf of Bruce Walkup; Willis S. Slusser; Thelen, Marrin, Johnson & Bridges, Attorneys for Plaintiff and Cross-Defendant, The Permanente Metals Corporation, a corporation.

ELLIOTT H. PENTZ,

On behalf of Hill, Morgan & Farrer; Tinning DeLap; Mellin and Hanscom, Attorneys for Defendants and Cross-Complainants, John Urquhart Birnie, individual doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, a corporation.

Deposition of R. L. McDonald, taken on behalf of the plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, in Room 4852, Department of Commerce, in Washington, D. C., at ten o'clock a.m., on the 1st day of October, 1947, by Chloe S. MacReynolds, Court Reporter, before John P. Labofish, a Notary Public within and for the District of Columbia, pursuant to the annexed stipulation.

R. L. McDONALD

a witness produced on behalf of the plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, being first duly sworn to state

(Deposition of R. L. McDonald.)

the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

Mr. Walkup: May the record show that this deposition is taken at this time and place pursuant to written stipulation which I now hand to the reporter and request that it be attached to the original deposition.

It is perfectly agreeable with me, Mr. Pentz, that the [2*] Notary Public, having sworn the witness, may withdraw and it may be deemed that he remained in attendance, and that if the witness refuses to answer any question that the Notary Public instruct him to answer, if you care to so stipulate.

Mr. Pentz: I don't care to, Mr. Walkup.

Mr. Walkup: You would prefer to have him remain in attendance?

Mr. Pentz: Yes, I would rather have him remain.

Mr. Walkup: All right.

Let the record show that the appearances at the deposition this morning are as follows:

Elliott H. Pentz, appearing on behalf of Hill, Morgan & Farrer; Tinning & DeLap; and Mellin and Hanscom, Attorneys for defendants and cross-complainants, John Urquhart Birnie, an individual doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, a corporation; and Bruce Walkup, appearing on behalf of Bruce Walkup; Willis S. Slusser; and Thelen, Marrin, Johnson & Bridges, Attorneys for plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation.

* Page numbering appearing at top of page of original Reporter's Transcript of Record

(Deposition of R. L. McDonald.)

Let the record show that other than the Notary Public, the Reporter and the witness, there were no other persons present than Mr. Walkup and Mr. Pentz.

I would like the record to show also that I served upon the Attorney General, by registered mail, a copy of the notice [3] of the deposition, as it was originally scheduled, and prior to the various continuances which have advanced the date of the taking of the depositions to this time and place.

Direct Examination

By Mr. Walkup:

Q. What is your name, sir?

A. R. L. McDonald.

Q. What is your official position?

A. I am Assistant Secretary of the Maritime Commission.

Q. Where do you reside?

A. Silver Spring, Maryland.

Q. Have you been designated by the Chairman of the United States Maritime Commission to appear and testify on behalf of the Chairman, pursuant to the notice of deposition which specified that either the Chairman of the Commission or such other person or persons as he should designate to testify on his behalf should give certain testimony in these proceedings?

A. I can furnish the records of the Commission, if that is what you want.

Q. My question is have you been designated?

(Deposition of R. L. McDonald.)

A. I have been, yes.

Q. Mr. McDonald, I hand you a document bearing date of March 9, 1944, and request you please to identify that document.

A. Do you want me to read the caption [4] here.

Q. No.

A. This is part of the official records of the Maritime Commission. What other identification do you want?

Q. Will you please state what type of document that is?

A. It is a memorandum which was approved by the Maritime Commission at a meeting April 13, 1944.

Q. In the practice followed in the Commission is a record customarily kept of the proceedings of the Commission?

A. A record is kept.

Q. And pursuant to what order is the record kept?

A. Section 201(c) Merchant Marine Act of 1936.

Q. The document dated March 9, 1944, which I have just showed you, is a memorandum of certain official action of the Commission approved by the Commission?

A. That is right.

Q. As of what date was it approved by the Commission?

A. April 13, 1944.

Mr. Walkup: I would like to have the reporter identify that document as Exhibit A on behalf of plaintiff and cross-defendant, The Permanente Metals Corporation.

(Deposition of R. L. McDonald.)

(Certified photostatic copy of memorandum approved by United States Maritime Commission at meeting on April 13, 1944, marked for identification as Plaintiff and Cross-Defendant's, The Permanente Metals Corporation, Exhibit A.) [5]

Q. (By Mr. Walkup): Do the actions of the Maritime Commission, such as Plaintiff's Exhibit A for identification, constitute official records of the Maritime Commission? A. They do.

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit A, and for the purposes of convenience, instead of saying in each case "Plaintiff's and Cross-Defendant's" I will merely state "Plaintiff's" for brevity. Is that agreeable, Mr. Pentz?

Mr. Pentz: That is agreeable on the assumption it is likewise agreed that in cases where I did not give the full party designations in the deposition taken of the Secretary of the Navy that we have the same understanding in that case as well as in this.

Mr. Walkup: Certainly; and we might also save some time if when I refer to The Permanente Metals Corporation, instead of stating the full name I merely call it "Permanente."

Mr. Pentz: Very well, with the like understanding that insofar as any reference I made to the parties in the deposition of the Secretary of the Navy that we have a similar understanding.

Mr. Walkup: Certainly.

Mr. Pentz: I wish the record to show that ordi-

(Deposition of R. L. McDonald.)

narily I would object to the introduction of Plaintiff's Exhibit A, [6] and similarly would object to the introduction of any other exhibits that may be offered, on the ground that they should be read into the record.

However, if it is satisfactory with you, Mr. Walkup, to agree with me that the Commissioner is considered authorized to procure for our several uses correct copies or a copy of these exhibits, then it is agreeable to me that the exhibits may go into the record without being read.

Mr. Walkup: Certainly; that is in line with our previous discussion on this subject. We also will need copies because we do not have extra copies of the documents which are being introduced.

I suggest that we have the notary procure photostatic copies of the various exhibits and obtain the necessary number of sets for the attachment to the copies of the deposition and for distribution to counsel.

Mr. Pentz: That is agreeable.

(The memorandum heretofore marked Plaintiff's Exhibit A for identification, was offered in evidence as Plaintiff's Exhibit A.)

Q. (By Mr. Walkup): Mr. McDonald, I hand you now a document bearing date of May 22, 1944, and ask you to kindly identify that document.

A. This is a memorandum addressed to the Commission by Mr. H. L. Vickery, formerly a Commissioner of the Maritime Commission, which was con-

(Deposition of R. L. McDonald.)

sidered at a meeting held on May 30, [7] 1944, and approved by the Commission on that date.

Mr. Walkup: Would you kindly mark that as Plaintiff's Exhibit B for identification?

(Certified photostatic copy of memorandum approved by United States Maritime Commission at meeting on May 30, 1944, marked for identification as Plaintiff's Exhibit B.)

Q. (By Mr. Walkup): Mr. McDonald, would your testimony as to the official nature of this document, Plaintiff's Exhibit B, be the same as your testimony concerning Plaintiff's Exhibit A?

A. Yes.

Q. And this action of the Commission is an official record of the United States Maritime Commission?

A. That is right.

Mr. Walkup: I offer this document in evidence as Plaintiff's Exhibit B.

(The memorandum heretofore marked Plaintiff's Exhibit B for identification, was offered in evidence as Plaintiff's Exhibit B.)

Q. (By Mr. Walkup): Mr. McDonald, referring again to Plaintiff's Exhibit B, is the original of this document in the possession and under the control of the Secretary of the United States Maritime Commission?

A. It is.

Q. And is that also true as to the original [8] of Plaintiff's Exhibit A?

A. It is.

Q. I hand you now a document bearing date

(Deposition of R. L. McDonald.)

November 13, 1945, and ask you please to identify that document.

A. This is a memorandum submitted to the Commission by the Director of our Division of Vessel Disposal and Government Aids, dated November 13, 1945, on the subject "Post-war Navy and United States Merchant Fleet," which was considered by the Commission and approved at a meeting on November 13, 1945.

Q. Is that a record of official proceedings of the United States Maritime Commission?

A. It is.

Q. And is that an official record of the United States Maritime Commission? A. It is.

Q. Is it in the possession and under the control of the Secretary of the United States Maritime Commission? A. It is.

Mr. Walkup: Would you please mark this Plaintiff's Exhibit C for identification?

(Certified photostatic copy of memorandum approved by United States Maritime Commission at meeting on November 13, 1945, marked for identification as Plaintiff's Exhibit C.) [9]

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit C.

(The memorandum heretofore marked Plaintiff's Exhibit C for identification, was offered in evidence as Plaintiff's Exhibit C.)

Q. (By Mr. Walkup): I hand you now a document bearing date January 7, 1946, and ask you please to identify that document.

(Deposition of R. L. McDonald.)

A. This is a memorandum from the Division of Vessel Disposal and Government Aids, dated January 7, 1946, addressed to the Maritime Commission on the subject "Navy Post-war Fleet." It was considered and approved by the Commission at a meeting on January 10, 1946.

Q. Is that a Division of the Maritime Commission?

A. This is a Division of the Maritime Commission.

Q. Does the document indicate on there the fact of approval by the Commission?

A. It does.

Q. And how is that shown on the document?

A. That bears the signature of the Secretary of the Commission and it was acted on and approved at this meeting on January 10, 1946.

Q. That is stamped on page 3 of the memorandum? A. That is right.

Q. Is this record, of which this is a copy, an official [10] record of the United States Maritime Commission? A. It is.

Q. And is the original of this document in the possession and under the control of the Secretary of the Maritime Commission? A. It is.

Mr. Walkup: Would you please mark this as Plaintiff's Exhibit D for identification?

(Certified photostatic copy of memorandum entitled "Navy Post-war Fleet," approved by United States Maritime Commission at meeting on January 10, 1946, marked for identification as Plaintiff's Exhibit D.)

(Deposition of R. L. McDonald.)

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit D.

(The memorandum heretofore marked Plaintiff's Exhibit D for identification, was offered in evidence as Plaintiff's Exhibit D.)

Q. (By Mr. Walkup): Now, referring to Plaintiff's Exhibits A to D, inclusive, those are all documents falling in the same category, are they not; that is, records of proceedings of the United States Maritime Commission?

A. That is right. They all show in the minutes of the Commission formally written up and retained as part of the official records of the Maritime Commission.

Q. And all of those records are kept pursuant to the [11] requirements of law?

A. That is right.

Q. And all of those records of proceedings are under the custody and control of the Secretary of the United States Maritime Commission?

A. That is correct.

Q. And all of those records are official records of the United States Maritime Commission?

A. They are.

Q. I hand you now a document bearing date of February 13, 1947, and ask you please to identify that document.

A. This is also a memorandum submitted to the Commission for consideration by the Managing Director Finance Department, dated February 13,

(Deposition of R. L. McDonald.)

1947, and approved by this Commission at a meeting on February 25, 1947.

Mr. Walkup: Will you please mark that as Plaintiff's Exhibit E for identification?

(Certified photostatic copy of memorandum dated February 13, 1947, approved by United States Maritime Commission at meeting held February 25, 1947, marked for identification as Plaintiff's Exhibit E.)

Q. (By Mr. Walkup): Is this document an official record of the United States Maritime Commission? A. It is.

Q. And is the original of this document in the possession [12] and under the control of the Secretary of the United States Maritime Commission?

A. It is.

Q. Is this record a record of official proceedings of the Maritime Commission pursuant to law?

A. It is.

Q. And is the requirement for the keeping of this record the same as that to which you have previously testified for records of Commission action?

A. That is right.

Q. Is it true that this document falls in the same category of Commission records as Plaintiff's Exhibits A to D, inclusive, concerning which you have previously testified? A. That is right.

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit E.

(Deposition of R. L. McDonald.)

(The memorandum heretofore marked Plaintiff's Exhibit E for identification, was offered in evidence as Plaintiff's Exhibit E.)

Q. (By Mr. Walkup): I hand you now a document bearing date of March 3, 1947, and request that you please identify that document.

A. This is a copy of a letter sent by Mr. A. J. Williams, Secretary, Maritime Commission, dated March 3, 1947, to the Birnie Electric Company, Los Angeles. [13]

Mr. Walkup: Would you please mark that as Plaintiff's Exhibit F for identification?

(Copy of letter dated March 3, 1947, to Birnie Electric Company from A. J. Williams, Secretary, Maritime Commission, marked for identification as Plaintiff's Exhibit F.)

Q. (By Mr. Walkup): Is the copy of this letter, of which this is itself a copy, on file in the files of the Secretary of the United States Maritime Commission?

A. It is. The Secretary is the official custodian of all records of the Maritime Commission.

Q. Was this letter of March 3, 1947, which you have identified, sent by the Secretary of the Commission in the line of his official duties as such?

A. It was.

Q. And does this copy of the letter constitute an official record of the United States Maritime Commission? A. I would think so, yes.

Q. Well, for the purpose of these proceedings,

(Deposition of R. L. McDonald.)

rather than stating it in the term of a thought, could you state it as a fact?

A. Well, I will state it as a fact, yes; just like any other piece of paper might be around the place.

Mr. Walkup: Mr. Pentz, I want to ask you if you would be willing to stipulate that the letter of March 3, 1947, [14] addressed to Birnie Electric Company, which is Plaintiff's Exhibit F for identification, was in fact received by Birnie Electric Company subsequent to March 3, 1947?

Mr. Pentz: I am unable to stipulate to anything in this case, Mr. Walkup. I do not possess the authority to do it.

Q. (By Mr. Walkup): Would you please state, Mr. McDonald, what the procedure in the Commission is as to the mailing of outgoing mail from the Secretary of the Commission to some party outside of the Commission?

A. What do you mean by that?

Q. Would you please state what, in the ordinary procedure of the Commission, what procedure would be followed with reference to the mailing of a letter such as the letter of March 3, 1947?

A. Well, of course, the letter would be presented to Mr. Williams for signature, in his official capacity, which was done in this case, and he, of course, would sign it, and it would be turned over to our Mail Unit, which is a part of the Office of the Secretary, and, of course, be handled like any other piece of mail, assuming that this was not registered,

(Deposition of R. L. McDonald.)

and would be mailed, and, of course, we expect delivery in due course.

Q. What is the mailing procedure in the Secretary's office? How does the actual handling of the outgoing mail [15] take place?

A. It was turned over by the Secretary's office itself to the Mail Division, the Unit of the Division, and that in turn handles it. The mail is put in an envelope and, of course, dropped in the mail box.

Q. You are familiar with that procedure?

A. Yes.

Q. Of your knowledge? A. Yes, I am.

Q. And that procedure is under the direction and control of the Secretary's Office of the Commission? A. That is right.

Q. Is it possible for you to tell in the case of any particular letter whether it was actually physically deposited in the United States mail, other than by the following of the general procedure?

A. That is the only way we could determine whether it was mailed or not. We expected it to be mailed, in compliance with instructions of the Office.

Q. Referring to the letter of March 3, 1947, do you have any knowledge that the customary procedure was not followed as to the mailing of the letter? A. I have not.

Mr. Walkup: I offer in evidence Plaintiff's Exhibit F.

(The letter heretofore marked Plaintiff's Exhibit F for identification, [16] was offered in evidence as Plaintiff's Exhibit F.)

(Deposition of R. L. McDonald.)

Q. (By Mr. Walkup): Mr. McDonald, I now hand you a document bearing date of 14 April, 1944. Would you kindly identify that document?

A. This is a copy of a letter signed by General Marshall, as Chief of Staff, U. S. Army, for the Joint Chiefs of Staff, addressed to Admiral Land, and the original of this is on file with the Maritime Commission.

Mr. Walkup: Would you please mark that as Plaintiff's Exhibit G for identification?

(Copy of letter dated 14 April, 1944, to Admiral E. S. Land, signed G. C. Marshall, Chief of Staff, U. S. Army, marked for identification as Plaintiff's Exhibit G.)

Q. (By Mr. Walkup): Is the original of this letter on file in the files of the Secretary of the United States Maritime Commission?

A. To the best of my knowledge, it is.

Q. Is the receiving of such communications part of the official duties of the Chairman of the United States Maritime Commission? A. Yes, sir.

Q. And is this letter of 14 April, 1944, an official record of the United States Maritime Commission?

A. It is. It is on file among the official records of [17] the Maritime Commission.

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit G.

(Copy of letter heretofore marked Plaintiff's

(Deposition of R. L. McDonald.)

Exhibit G for identification, was offered in evidence as Plaintiff's Exhibit G.)

Q. (By Mr. Walkup): I hand you now document bearing date of December 10, 1943, and ask that you please identify that document.

A. This is a copy of a letter dated December 10, 1943, from the Navy Department, Bureau of Ships, addressed to the Chairman of the Maritime Commission.

Mr. Walkup: Would you please mark that as Plaintiff's Exhibit H for identification?

(Certified photostatic copy of letter, dated December 10, 1943, to the Chairman, U. S. Maritime Commission, from C. L. Brand, by direction of Chief of Bureau, Bureau of Ships, marked for identification as Plaintiff's Exhibit H.)

Q. (By Mr. Walkup): Is the letter, of which this is a copy, an official record of the United States Maritime Commission? A. It is.

Q. And does the duty of the Chairman of the United States Maritime Commission include the receiving of correspondence of this nature from other branches of the Federal [18] Government?

A. It does.

Q. And is the original of this document under the direction, supervision, and control of the Secretary of the United States Maritime Commission?

A. It is.

(Deposition of R. L. McDonald.)

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit H.

(The letter heretofore marked for identification as Plaintiff's Exhibit H, was offered in evidence as Plaintiff's Exhibit H.)

Q. (By Mr. Walkup): I hand you now a letter dated 9 November, 1943, and request you to identify that document.

A. This is a letter from Admiral William D. Leahy, United States Navy, dated 9 November, 1943, on the letterhead of The Joint Chiefs of Staff, addressed to Admiral Land as Chairman of the Maritime Commission.

Mr. Walkup: Would you please mark that as Plaintiff's Exhibit I for identification?

(Certified photostatic copy of letter dated 9 November, 1943, to Admiral E. S. Land, from Admiral William D. Leahy, U. S. Navy, marked for identification as Plaintiff's Exhibit I.) [19]

Q. (By Mr. Walkup): Is the letter, of which this is a copy, on file in the records of the United States Maritime Commission? A. It is.

Q. And is it an official record of the United States Maritime Commission?

A. It is an official record of the United States Maritime Commission.

Q. Do the duties of the Chairman of the United States Maritime Commission include the receiving

(Deposition of R. L. McDonald.)

of official communications of this character from other branches of the Federal Government?

A. They do.

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit 1.

(Copy of letter heretofore marked Plaintiff's Exhibit 1 for identification, was offered in evidence as Plaintiff's Exhibit 1.)

Q. (By Mr. Walkup): I hand you a document bearing date 27 September, 1944, and ask you please to identify that document.

A. This is a letter dated September 27, 1944, from Rear Admiral W. W. Smith, United States Navy, addressed to the Chairman of the Maritime Commission.

Mr. Walkup: Will you please mark that as Plaintiff's [20] Exhibit J for identification?

(Certified photostatic copy of letter dated September 27, 1944, to Chairman, Maritime Commission, from W. W. Smith, Rear Admiral, U. S. Navy, marked for identification as Plaintiff's Exhibit J.)

Q. (By Mr. Walkup): Is the original letter, of which this is a copy, on file with the Secretary of the Maritime Commission? A. It is.

Q. Is the original letter an official record of the United States Maritime Commission?

A. It is.

Q. Do the duties of the Chairman of the United

(Deposition of R. L. McDonald.)

States Maritime Commission include the receiving of communications of this character from other branches of the Federal Government?

A. They do.

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit J.

(The letter heretofore marked for identification as Plaintiff's Exhibit J, was offered in evidence as Plaintiff's Exhibit J.)

Q. (By Mr. Walkup): I hand you now a document bearing date June 10, 1944, and ask you kindly to identify that document.

A. This is a memorandum dated June 10, 1944, from the Maritime Commission Budget Officer to the Director of the [21] Bureau of Technical Division.

Q. Does that refer to the Technical Division of the Commission?

A. Of the Maritime Commission. It is an inter-office memorandum.

Mr. Walkup: Will you mark that for identification as Plaintiff's Exhibit K?

(Certified photostatic copy of memorandum dated June 10, 1944, to Director, Technical Division, Budget Officer, signed William U. Kirsch, Budget Officer, marked for identification as Plaintiff's Exhibit K.)

Q. (By Mr. Walkup): Referring to Plaintiff's Exhibit K for identification will you please state

(Deposition of R. L. McDonald.)

whether or not the making of such inter-office memoranda is one of the official duties of the Budget Officer of the United States Maritime Commission? A. It is.

Q. And would the making of an inter-office memorandum such as this be done in the regular course of official duties of the Budget Officer?

A. It would be.

Q. Is the original memorandum, of which this is a copy, on file in the official files and records of the Maritime Commission? A. It is. [22]

Q. And is this an official record of the Maritime Commission? A. I would say so, yes.

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit K.

(The memorandum heretofore marked Plaintiff's Exhibit K for identification, was offered in evidence as Plaintiff's Exhibit K.)

Q. (By Mr. Walkup): Mr. McDonald, I hand you now a document bearing date of March 16, 1944, and ask you please to identify the document.

A. This is an inter-office memorandum dated March 16, 1944, from the Budget Officer to Mr. Huntington T. Morse, Assistant to the Chairman.

Q. Mr. Morse is Assistant to the Chairman of the Maritime Commission?

A. Of the Maritime Commission, yes.

Mr. Walkup: Would you please mark this for identification as Plaintiff's Exhibit L?

(Deposition of R. L. McDonald.)

(Certified photostatic copy of inter-office memorandum, March 16, 1944, to Huntington T. Morse, Asst. to Chairman, from William U. Kirsch, Budget Officer, marked for identification as Plaintiff's Exhibit L.)

Q. (By Mr. Walkup): Mr. McDonald, would your testimony concerning the [23] previous exhibit, Exhibit K, be the same as to the requirement that the Budget Officer keeps that inter-office memorandum in the regular course of his Commission business? A. It would be, yes.

Q. And is the original of this inter-office memorandum on file in the records of the Commission?

A. It is.

Q. And does it constitute an official record of the Commission? A. It does.

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit L.

(Inter-office memorandum heretofore marked Plaintiff's Exhibit L for identification, was offered in evidence as Plaintiff's Exhibit L.)

Q. (By Mr. Walkup): I hand you now a document bearing date of November 13, 1944, and request that you identify that document.

A. This is a copy of a letter dated November 13, 1944, from Admiral E. S. Land, Chairman of the Maritime Commission, to Vice Admiral F. J. Horne, United States Navy, Vice Chief of Naval Operations.

(Deposition of R. L. McDonald.)

Mr. Walkup: Please mark this for identification as Plaintiff's Exhibit M.

(Certified photostatic copy of letter dated November 13, 1944, from Admiral E. S. Land to Vice Admiral F. J. [24] Horne, marked for identification as Plaintiff's Exhibit M.)

Q. (By Mr. Walkup): Referring to Plaintiff's Exhibit M for identification, is the copy of this letter, of which Exhibit M for identification is a copy, on file among the official records of the Maritime Commission? A. It is.

Q. And do the duties of the Chairman of the Maritime Commission include the sending of letters to other branches of the Federal Government?

A. They do.

Q. And was the letter of November 13, 1944, a letter sent by the Chairman of the Commission in the course of his official duties as such?

A. It was.

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit M.

(Copy of letter heretofore marked for identification as Plaintiff's Exhibit M, was offered in evidence as Plaintiff's Exhibit M.)

Q. (By Mr. Walkup): Mr. McDonald, I hand you now a document bearing certification of the Secretary of the United States Maritime Commission under date of September 30, 1947, and consisting of various documents, bearing date of December

(Deposition of R. L. McDonald.)

6, 1943, [25] December 11, 1943, April 25, 1944, and June 3, 1944.

Would you please identify first the document bearing date of December 6, 1943?

A. This is a letter addressed to the Secretary of the Navy by Admiral E. S. Land, Chairman of the Maritime Commission, dated December 6, 1943.

Q. Would you now please identify the document bearing date of December 11, 1943?

A. This letter is addressed to the Secretary of the Navy by Admiral Land, dated December 11, 1943.

Q. Would you please now identify the document bearing date of April 25, 1944?

A. This is a letter addressed to the Secretary of the Navy by Admiral Land, as Chairman of the Maritime Commission, dated April 25, 1944.

Q. Would you please now identify the document bearing date of June 3, 1944?

A. This is a letter addressed to the Secretary of the Navy by Admiral E. S. Land, as Chairman of the Maritime Commission, dated June 3, 1944.

Mr. Walkup: Would you kindly mark these four letters for identification, and I would suggest that they each be given a separate letter for identification, starting with our next letter that is available.

(Certified photostatic copy of letter dated December 6, 1943, to the [26] Secretary of the Navy from Admiral E. S. Land, Chairman, Maritime Commission, marked for identification as Plaintiff's Exhibit N.)

(Deposition of R. L. McDonald.)

(Certified photostatic copy of letter dated December 11, 1943, to the Secretary of the Navy, signed by Admiral E. S. Land, Chairman, marked for identification as Plaintiff's Exhibit O.)

(Certified photostatic copy of letter dated April 25, 1944, to the Secretary of the Navy, signed Admiral E. S. Land, Chairman, marked for identification Plaintiff's Exhibit P.)

(Certified photostatic copy of letter dated June 3, 1944, to the Secretary of the Navy, signed Admiral E. S. Land, Chairman, marked for identification as Plaintiff's Exhibit Q.)

Mr. Walkup: These have now been marked so that Exhibit N is the letter of December 6, 1943; the letter of December 11, 1943, is marked as Plaintiff's Exhibit O; the letter of April 25, 1944, is marked as Plaintiff's Exhibit P; and the letter of June 3, 1944, is marked for identification as Plaintiff's Exhibit Q.

Q. (By Mr. Walkup): Referring now to each of these four letters, are they all letters from the Chairman of the Commission to the Secretary of the Navy? A. They are.

Q. And were they all written by the Chairman of the Commission in the official course of his duties as such? [27] A. They were.

Q. Is the copy of each of these letters, of which

(Deposition of R. L. McDonald.)

the exhibits are in turn copies, on file with the Secretary of the Commission? A. They are.

Q. And are each of the letters, Plaintiff's Exhibits N to Q, inclusive, official records of the United States Maritime Commission?

A. They are.

Mr. Walkup: I offer these in evidence as Plaintiff's Exhibit N, Plaintiff's Exhibit O, Plaintiff's Exhibit P, and Plaintiff's Exhibit Q, respectively, and I make the offer apply to each letter independently.

(The letters heretofore marked Plaintiff's Exhibits N to Q, inclusive, for identification, were offered in evidence as Plaintiff's Exhibits N to Q, inclusive.)

Q. (By Mr. Walkup): Mr. McDonald, I hand you now a document certified by the Secretary of the Commission under date of September 30, 1947, which in turn contains documents bearing date of February 29, 1944; May 25, 1944; June 17, 1944, and July 3, 1944.

Would you please identify each of the four documents bearing dates as just described?

A. The first letter is dated 29 February, 1944, from the Secretary of the Navy, addressed to the Chairman of the [28] United States Maritime Commission.

The next letter is dated 25 May, 1944, from the Secretary of the Navy to the Chairman of the Maritime Commission.

(Deposition of R. L. McDonald.)

The next is a letter dated 17 June, 1944, from the Secretary of the Navy to the Chairman of the Maritime Commission.

The fourth letter is dated 3 July, 1944, from the Secretary of the Navy to the Chairman of the Maritime Commission.

Mr. Walkup: Will you please mark those for identification as Plaintiff's Exhibits next in order, each letter having a separate letter designated.

(Certified photostatic copy of letter dated February 29, 1944, to the Chairman, U. S. Maritime Commission, from the Secretary of the Navy, was marked for identification as Plaintiff's Exhibit R.)

(Certified photostatic copy of letter dated 25 May, 1944, to the Chairman, U. S. Maritime Commission, from the Secretary of the Navy, was marked for identification as Plaintiff's Exhibit S.)

(Certified photostatic copy of letter dated 17 June, 1944, to the Chairman, U. S. Maritime Commission, from the Secretary of the Navy, was marked for identification as Plaintiff's Exhibit T.)

(Certified photostatic copy of letter dated 3 July, 1944, to the Chairman, U. S. Maritime Commission, from the Secretary of the Navy, was marked Plaintiff's Exhibit U for identification.)

(Deposition of R. L. McDonald.)

Mr. Walkup: The reporter has now marked these four [29] documents as follows:

The letter of 29 February, 1944, as Plaintiff's Exhibit R for identification;

The letter of 25 May, 1944, as Plaintiff's Exhibit S for identification;

The letter of June 17, 1944, as Plaintiff's Exhibit T for identification;

The letter of 3 July, 1944, as Plaintiff's Exhibit U for identification.

Q. (By Mr. Walkup): Are the original letters, of which these four exhibits, Plaintiff's Exhibits R to U, inclusive, are photostatic copies, in the possession and under the control of the Secretary of the Maritime Commission? A. They are.

Q. Were these letters, Plaintiff's Exhibits R to U, inclusive, received by the Chairman of the United States Maritime Commission in the course of his official duties as such? A. They were.

Q. And are these four letters, copies of which are Exhibits R to U, inclusive, official records of the United States Maritime Commission?

A. They are.

Q. Do the duties of the Chairman of the United States [30] Maritime Commission include the receiving of official communications from other branches of the Federal Government, and particularly from the Secretary of the Navy?

A. They do.

Mr. Walkup: I offer these four documents now identified as Plaintiff's Exhibits R to U, in-

(Deposition of R. L. McDonald.)

clusive, in evidence as Plaintiff's Exhibits R to U, inclusive, and the offer is intended as an independent offer of each letter separately, merely lumping them together for convenience and brevity.

Do you make any objection on the ground I didn't offer each one separately?

Mr. Pentz: None whatsoever.

(The letters heretofore marked as Plaintiff's Exhibits R to U, inclusive, for identification, were offered in evidence as Plaintiff's Exhibits R, S, T and U.)

Mr. Walkup: That constitutes the direct examination of the witness, Mr. Pentz.

Mr. Pentz: May we go off the record?

(A discussion off the record was had.)

Mr. Walkup: Will the Notary Public please adjourn this hearing until nine o'clock tomorrow morning?

The Notary Public: This hearing is adjourned until nine o'clock tomorrow morning, October 2, 1947, and you will return without a further subpoena, Mr. McDonald.

Mr. Walkup: It is hereby stipulated that Mr. Pentz may [31] have access to the exhibits which have been introduced at the deposition this morning and may make arrangements with the Notary Public to obtain such access to the exhibits between now and the time of the adjourned session of the deposition, which will be tomorrow morning at nine

(Deposition of R. L. McDonald.)

o'clock, for the purpose of study and examination of the exhibits.

Mr. Pentz: It is so stipulated.

(Thereupon, at 12:15 o'clock p.m., the further taking of this deposition was adjourned to Thursday, October 2, 1947, at 9:00 o'clock a.m.)

Thursday, October 2, 1947

(The further taking of the deposition of the witness R. L. McDonald was resumed at 9:00 o'clock a.m.; the parties present being Bruce Walkup, Attorney on behalf of the Plaintiff and Cross-Defendant, The Permanente Metals Corporation, a corporation; Mr. Elliott H. Pentz, Attorney on behalf of the Defendants and Cross-Complainants, John Urquhart Birnie, an individual doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company; The Notary Public, John P. Labofish; the Reporter, Mrs. Chloe S. MacReynolds; and the witness, R. L. McDonald.) [32]

The Notary Public: The hearing is resumed this morning.

Mr. Pentz: Mr. Labofish, will you please remind the witness that he is still under oath?

The Notary Public: Yes. Mr. McDonald, you are reminded that you are still under oath.

The Witness: All right.

R. L. McDONALD

a witness produced on behalf of the Plaintiff and Cross-Defendant, The Permanente Metals Corporation, a corporation, having been previously sworn to state the truth, the whole truth, and nothing but the truth, testified further on his oath as follows:

Cross-Examination

By Mr. Pentz:

Q. Mr. McDonald, would you state how long previous to the present time you have been employed by the Maritime Commission?

A. I have been employed by the Maritime Commission ever since its inception in 1936, and prior to that by the old Shipping Board since 1919.

Q. Would you kindly state briefly the nature of your duties during the course of your employment by the United States Maritime Commission?

A. Well, for a number of years—with the Maritime Commission? [33]

Q. Yes, please.

A. I have been in the administrative end of the work as Assistant Secretary and Assistant Division Chief of Division of Administration.

Q. Over what period of time?

A. That is since the inception of the Maritime Commission.

Q. Until about what time did you hold that position? A. Which, administrative?

Q. Yes, the one you last referred to.

A. Oh, it was maybe two years.

(Deposition of R. L. McDonald.)

Q. That would bring it up roughly through 1938?

A. Yes, sir, we will say that; and since I have been Assistant Secretary of the Maritime Commission.

Q. And since 1938 you have been Assistant Secretary?

A. Yes. Those are approximate dates; I have forgotten the exact dates.

Q. Now, I wish to refer your attention to Plaintiff's Exhibit R. I will first ask you whether Plaintiff's Exhibit R, the original of that exhibit, is in your official possession and custody on behalf of the Commission?

A. To the best of my knowledge and belief, it is.

Q. I will direct your attention to that letter and ask if there is anything appearing thereon to indicate when the original letter was received by the United States [34] Maritime Commission?

A. Approximately March 1, 1944, as indicated by this stamp here, which is obliterated in part.

Q. Again, calling your attention to Plaintiff's Exhibit R, and more particularly to enclosure A, I take it that enclosure A was a part of the entire letter?

A. That is right.

Q. Directing your attention to enclosure A, and more particularly the dates appearing below the word "delivery," will you tell us, please, what significance, if you know, those dates imply?

A. I wouldn't know because I am only custodian

(Deposition of R. L. McDonald.)

of those records and I am not familiar with those at all.

Q. Am I to understand from your answer that you have no knowledge whatsoever of your own as to the meaning of the entries below the word "delivery"?

A. That is right, without examining the record, which I have not done, of course.

Q. Do you have in your possession records which would indicate the significance of those dates?

The Witness: What is that question again?

Mr. Pentz: Repeat the question, please.

(Pending question read.)

The Witness: By those dates do you refer to delivery dates? [35]

Mr. Pentz: That is exactly true.

Mr. Walkup: There are other dates on there, I believe.

Mr. Pentz: Not in that column.

Mr. Walkup: No; on that sheet.

Mr. Pentz: I will reframe the question if there is any misunderstanding.

Mr. Walkup: No, I think it is clear now.

Mr. Pentz: I believe I said, and if I didn't I will state that I have reference to the date in vertical column below the word "Delivery."

The Witness: I personally have no knowledge of what it means. Undoubtedly there is somebody in the organization who is thoroughly familiar with this and can amplify it to your satisfaction.

(Deposition of R. L. McDonald.)

Q. (By Mr. Pentz): Mr. McDonald, I understood you to state that you could not acquaint me with the significance of the dates referred to without reference to other records.

A. I didn't say other records; it may be——

Q. I will now ask you——

Mr. Walkup: Just a moment. The witness did not complete his answer.

Mr. Pentz: I have not completed my question.

Mr. Walkup: Could the record be read back and see if the witness was interrupted in the making of an answer? [36]

Mr. Pentz: I am the one that was propounding the question and I know whether I was finished.

Mr. Walkup: I would like to have the record read. I thought there was an interruption of the witness' answer. It may be the witness was interrupted and I would like to have the witness answer fully.

Mr. Pentz: I wish to make a statement. Have you finished, Mr. Walkup?

Mr. Walkup: Yes.

Mr. Pentz: I wish to state that I, being the person best informed as to what my question will be, will state for the record that I had no intention whatsoever of ending the question at the point where Mr. McDonald started to volunteer his answer.

Now, for the purpose of avoiding this needless confusion, I will ask the question once more.

Q. (By Mr. Pentz): Mr. McDonald, I refer

(Deposition of R. L. McDonald.)

your attention to Plaintiff's Exhibit R, more particularly to the paper thereto attached marked enclosure A, and will direct your attention to the vertical column of figures appearing below the word "Delivery."

Can you of your own knowledge acquaint me with the significance or meaning of the dates appearing in the said vertical column?

A. I cannot. [37]

Q. Do you have custody of any records which would assist you in acquainting me with the significance of those dates?

A. There probably are; undoubtedly there are records that show.

Mr. Pentz: Off the record.

(A discussion off the record was had.)

Q. (By Mr. Pentz): Mr. McDonald, do you have in your custody and control any documents or records pertaining to the dates of delivery by the United States Maritime Commission to the United States Navy of vessels identified by Maritime designation hull numbers MCV 552 through 573, inclusive?

A. If those vessels were delivered to the Navy there are undoubtedly records around here which would show the dates of delivery.

Q. I would like to have a direct answer to the question.

A. I can't tell you, of course, without going to the records and seeing, but I am quite sure that we do that because that is just a routine record.

(Deposition of R. L. McDonald.)

Q. Now, I ask you whether or not you are willing to permit the opportunity of viewing the records you refer to?

A. That undoubtedly can be arranged.

Mr. Pentz: Off the record.

(A discussion off the record was had.) [38]

Q. (By Mr. Pentz): Mr. McDonald, I refer your attention to Plaintiff's Exhibit I and particularly the language as follows:

"It is requested that the Maritime Commission construct 130 standard APA's."

Now, I will ask you when the vessels identified by Maritime Commission hull numbers 552 through 573, inclusive, were completed did those vessels constitute a portion of the 130 standard APA's referred to in the letter identified as Plaintiff's Exhibit I?

A. I wouldn't know without reference to records.

Mr. Pentz: Off the record.

(A discussion off the record was had.)

Q. (By Mr. Pentz): Mr. McDonald, are you willing to procure such records as you have in your custody bearing upon the last preceding question, to permit me to examine the same?

I have reference to such records as you deem necessary to place yourself in a position to furnish the information requested by the context of my preceding question.

Mr. Walkup: I will object to the form of the

(Deposition of R. L. McDonald.)

question as to whether or not the witness is willing to do it.

Mr. Pentz: I would like the witness, subject to your objection, Mr. Walkup, to answer the question.

Would you like to have it re-read? [39]

The Witness: Yes, please.

(Pending question read.)

The Witness: Off the record.

(A discussion off the record was had.)

Mr. Walkup: Perhaps you better read the question before that.

(Thereupon, the following was read:)

“Question: Mr. McDonald, I refer your attention to Plaintiff’s Exhibit I and particularly the language as follows:

“‘It is requested that the Maritime Commission construct 130 standard APA’s.’

“Now, I will ask you when the vessels identified by Maritime Commission hull numbers 552 through 573, inclusive, were completed did those vessels constitute a portion of the 130 standard APA’s referred to in the letter identified as Plaintiff’s Exhibit I?

“Answer: I wouldn’t know without reference to records.

“Question: Mr. McDonald, are you willing to procure such records as you have in your custody bearing upon the last preceding question, to permit me to examine the same?

(Deposition of R. L. McDonald.)

“I have reference to such records as you [40] deem necessary to place yourself in a position to furnish the information requested by the context of my preceding question.”

The Witness: I don't see how we can object to furnishing this information if we can dig it out of the records. We have to locate it first—in a published form.

Mr. Pentz: That can be deemed the answer to the question, so far as the answer goes.

Mr. Walkup: When you say “this information,” are you referring to the information mentioned in our off-the-record discussion?

The Witness: I am referring to his request that he be allowed to look at our records and ascertain whether these 130 actually were under this item we constructed.

Mr. Pentz: Off the record.

(A discussion off the record was had.)

The Notary Public: At 9:50 o'clock a.m., the hearing on the deposition was suspended until the witness announces he has located records with which to continue the hearing.

(Thereupon, at 9:50 o'clock a.m., the taking of the deposition was adjourned.) [41]

Friday, October 3, 1947

The Notary Public: Will the Reporter show the hearing was resumed at 9:10 o'clock a.m. and that the witness is reminded he is still under oath.

Thereupon,

R. L. McDONALD

witness produced on behalf of the Plaintiff and Cross-Defendant, The Permanente Metals Corporation, a corporation, having been previously sworn to state the truth, the whole truth, and nothing but the truth, testified further on his oath as follows:

Cross-Examination
(Resumed)

By Mr. Pentz:

Q. Mr. McDonald, I would like to have you give us the dates on which delivery was made by the United States Maritime Commission to the United States Navy of each of the vessels identified by United States Maritime Commission Hull Numbers 552 through 573, inclusive, and I will ask you please when you give us each of those dates that you kindly refer to the ship by Maritime Commission hull number and its name.

Mr. Walkup: Off the record.

(A discussion off the record was had.)

A. Maritime Commission Hull No. 552, the "Sarasota," delivered to the Navy by the Maritime Commission on 8-16-44.

Maritime Commission Hull No. 553, the "Sherburne," [42] delivered to the Navy by the Maritime Commission on 9-18-44.

Maritime Commission Hull No. 554, the "Sibley," delivered to the Navy by the Maritime Commission on 9-30-44.

(Deposition of R. L. McDonald.)

Maritime Commission Hull No. 555, the "Mifflin," delivered to the Navy by the Maritime Commission on 10-10-44.

Maritime Commission Hull No. 556, the "Talladega," delivered to the Navy by the Maritime Commission on 10-31-44.

Maritime Commission Hull No. 557, the "Tazewell," delivered to the Navy by the Maritime Commission on 10-25-44.

Maritime Commission Hull No. 558, the "Telfair," delivered to the Navy by the Maritime Commission on 10-31-44.

Maritime Commission Hull No. 559, the "Missoula," delivered to the Navy by the Maritime Commission on 10-27-44.

Maritime Commission Hull No. 560, the "Montrose," delivered to the Navy by the Maritime Commission on 10-31-44.

Maritime Commission Hull No. 561, the "Mount-rail," delivered to the Navy by the Maritime Commission on 11-16-44.

Maritime Commission Hull No. 562, the "Natrona," delivered to the Navy by the Maritime Commission on 11-8-44.

Maritime Commission Hull No. 563, the "Navarro," delivered to the Navy by the Maritime Commission on 11-15-44.

Maritime Commission Hull No. 564, the "Neshoba," delivered to the Navy by the Maritime Commission on 11-16-44.

Maritime Commission Hull No. 565, the "New

(Deposition of R. L. McDonald.)

Kent," delivered to the Navy by the Maritime Commission on 11-18-44. [43]

Maritime Commission Hull No. 566, the "Noble," delivered to the Navy by the Maritime Commission on 11-25-44.

Maritime Commission Hull No. 567, the "Oka-loosa," delivered to the Navy by the Maritime Commission on 11-24-44.

Maritime Commission Hull No. 568, the "Okanogan," delivered to the Navy by the Maritime Commission on 12-2-44.

Maritime Commission Hull No. 569, the "Oneida," delivered to the Navy by the Maritime Commission on 12-5-44.

Maritime Commission Hull No. 570, the "Pick-away," delivered to the Navy by the Maritime Commission on 12-10-44.

Maritime Commission Hull No. 571, the "Pitt," delivered to the Navy by the Maritime Commission on 12-12-44.

Maritime Commission Hull No. 572, the "Randall," delivered to the Navy by the United States Maritime Commission on 12-18-44.

Maritime Commission Hull No. 573, the "Bingham," delivered to the Navy by the Maritime Commission on 12-24-44.

Mr. Pentz: May the record show that Mr. Walkup and I have agreed that there will be no objection based on the testimony of Mr. McDonald as not being the best evidence regarding the delivery dates in the answer to the preceding question;

(Deposition of R. L. McDonald.)

nor any objection to this testimony based on the failure to produce any or all of the official records upon which the testimony was based.

Mr. Walkup: That is correct, provided that the same [44] stipulation is entered into with reference to the other testimony of Mr. McDonald this morning with reference to the information of a similar character gained by him from reference to the Maritime Commission records; and also with the further understanding that certain pages from the Maritime Commission report of vessel construction identified as pages 2B, 4B, 5B, 21B, 22B, 26B, and 27B, together with an abstract of information gained from official records of the United States Maritime Commission, entitled, "Total Number of Design VC 2-S-AP5 constructed by the United States Maritime Commission may be introduced without objection on the grounds that they are not the best evidence and without objection that they are not certified as true and correct copies of original records on file with the Commission.

Mr. Pentz: That is agreed.

For the purpose of clarification, may the record indicate, insofar as Mr. Walkup's statement and insofar as my statement are concerned, that the agreements as outlined by each of us are equally applicable to not only the matters described by Mr. Walkup but to the testimony of Mr. McDonald adduced in the last answer.

Mr. Walkup: In other words, what we are trying to do is waiving objections to the form of presenta-

(Deposition of R. L. McDonald.)

tion of the evidence and to the proper authentication of the documentary evidence but reserving all other objections. [45]

Mr. Pentz: That is correct.

Mr. Walkup: On both sides.

Mr. Pentz: Right.

Q. (By Mr. Pentz): Mr. McDonald, I hand you a paper headed by the following words, "Total Number of Design VC 2-S-AP5 Constructed by the United States Maritime Commission," and I will ask you to tell us what this purports to be?

A. As designated by its title, it purports to be total number of design VC 2-S-AP5's constructed by the United States Maritime Commission, which information was compiled from official records of the Maritime Commission.

Q. Does this indicate the total number of VC 2-S-AP5's design vessels built by the United States Maritime Commission during World War II?

A. To the best of my knowledge, it does; at least as shown by our records.

Q. That is what it purports to show?

A. That is right.

Q. And so far as you know it is accurate?

A. That is right.

Q. In the first column, directing your attention to the words in vertical column "California S.B. Corp" stands for California Shipbuilding Corporation, does it not? A. That is right. [46]

Q. The "Oregon S. B. Corp" stands for Oregon Shipbuilding Corporation? A. That is right.

(Deposition of R. L. McDonald.)

Q. In the second vertical column starting with the designation Mcc-15740, and the numbers below it, what do they indicate?

A. That is the contract number.

Q. And in the third vertical column starting with the letters "M. C. V.," et cetera, and the numbers in vertical column, they indicate what?

A. The hull numbers.

Q. And in the last vertical column starting with figures 30 and the figures underneath represent what?

A. The numbers of ships constructed.

Mr. Pentz: I ask that that paper be identified as Defendants' Exhibit 8.

(Document entitled, "Total Number of Design VC 2-S-AP5 Constructed by the United States Maritime Commission," was marked Defendants' Exhibit 8 for identification.)

Mr. Pentz: At this time I offer Defendants' Exhibit 8 into evidence.

(The document heretofore marked Defendants' Exhibit 8 for identification, was offered in evidence as Defendants' Exhibit 8.)

Mr. Pentz: I have no further questions. [47]

Redirect Examination

By Mr. Walkup:

Q. Mr. McDonald, referring to Defendants' Exhibit 8, which was just introduced, I show you pages 2B, 4B, 5B, 21B, 22B, 26B and 27B of the

(Deposition of R. L. McDonald.)

completed vessels report of the Maritime Commission.

These sheets are the records, are they not, from which the total of 117 vessels appearing on Defendants' Exhibit 8 was compiled?

A. That is right.

Q. And just for the purpose of clarification, on page 2B all of the vessels shown are AP5's?

A. I would say so, yes.

Q. And on page 4B the AP5's start with the vessels listed below the red line?

A. That is right.

Q. And other vessels of this type appearing on that page are marked out in red?

A. That is right.

Q. On page 5B the same situation is true with reference to the marking out of vessels other than AP5's?

A. That is right.

Q. The same is true also on page 21B; is that right?

A. That is right.

Q. And the same is also true as to page [48] 22B?

A. That is right.

Q. And the same is true also as to page 26B with reference to the marking out?

A. That is right.

Q. The same statements also as to page 27B with reference to the marking out of all those other than the AP5's?

A. That is right.

Q. This particular series of pages show in each case the percentage of completion as 100 per cent?

A. Apparently it does.

(Deposition of R. L. McDonald.)

Q. Except as to page 21B, which at the top says "Completed Contracts." A. Yes.

Q. All of the other pages showing as to the AP5's 100 per cent completion?

A. That is right.

Q. It is true, is it not, that during the course of construction of vessels and during the progress of the war, reports of this general character were issued on a progress basis showing percentage of total completion as less than 100 per cent?

A. Yes. Those reports are issued monthly to show the progress; it is just a regular routine of the organization.

Q. So the fact that the operator on this report appears, as designated under the heading "Operator," in each case does [49] not necessarily mean that that was the name of the operator at the time the construction of the vessel was undertaken?

A. Oh, no.

Mr. Walkup: I offer these sheets numbered as described 2B, 4B, 5B, 21B, 22B, 26B and 27B in evidence as Plaintiff's Exhibits II to OO, inclusive.

(Page 2B of the Completed Vessels Report of the Maritime Commission, was marked for identification and offered in evidence as Plaintiff's Exhibit II.)

(Page 4B of the Completed Vessels Report of the Maritime Commission, was marked for identification and offered in evidence as Plaintiff's Exhibit JJ.)

(Deposition of R. L. McDonald.)

(Page 5B of the Completed Vessels Report of the Maritime Commission, was marked for identification and offered in evidence as Plaintiff's Exhibit KK.)

(Page 21B of the Completed Vessels Report of the Maritime Commission, was marked for identification and offered in evidence as Plaintiff's Exhibit LL.)

(Page 22B of the Completed Vessels Report of the Maritime Commission, was marked for identification and offered in evidence as Plaintiff's Exhibit MM.)

(Page 26B of the Completed Vessels Report of the Maritime Commission, was marked for identification and offered in evidence as Plaintiff's Exhibit NN.) [50]

(Page 27B of the Completed Vessels Report of the Maritime Commission, was marked for identification and offered in evidence as Plaintiff's Exhibit OO.)

Mr. Pentz: I am going to interrupt; Mr. McDonald spoke hastily in answering that last question, so hastily that I couldn't have possibly got in an objection to it.

I wish to have the record show that I desire to object to the question on this ground, namely, that the form of the question called for the conclusion of the witness, and on that ground I interpose an objection.

Mr. Walkup: Off the record.

(Deposition of R. L. McDonald.)

(A discussion off the record was had.)

Q. (By Mr. Walkup): Mr. McDonald, will you please state the meaning of the heading "Operator," on each of these sheets as it appears at the top of each column?

A. The word "Operator" is part of the standardized form used to compile this report and it does not necessarily mean that the United States Navy was the operator. It really means to whom these particular ships were delivered in each instance. In other words, this report was adopted to utilize this form.

Q. That refers, then, to the operator of a completed vessel after delivery?

A. That is right. [51]

Q. In response to request you have obtained from the official records of the Commission information with reference to Hulls 525 to 601 built by the United States Maritime Commission and to whom these hulls were delivered by the Commission. This information has now been compiled under your direction on a sheet of paper which I now hand you and ask you if the information appearing thereon is information compiled or excerpted from the official Maritime Commission records?

A. To the best of my knowledge and belief this information is correct as shown by this statement.

Q. This is information compiled from records at your request? A. That is right.

Q. I note from this sheet that there has been

(Deposition of R. L. McDonald.)

an omission of hulls 552 to 573. Those were the vessels which as shown by Defendants' Exhibit 8 were delivered by the Maritime Commission to the United States Navy?

A. I believe so. In other words, you are asking whether these others were built by other contractors?

Q. In the preparation of the list which I am now referring to hulls numbered 552 to 573 were omitted. A. That is right.

Q. That was for the reason that those vessels, as shown by Defendants' Exhibit 8, were delivered by the Maritime [52] Commission to the United States Navy? A. That is right.

Q. These hulls numbered 552 to 573?

A. That is right.

Mr. Walkup: Would you please mark this sheet concerning which the witness has just been testifying as Plaintiff's Exhibit FF?

(The document entitled "M.C.V. Hulls 525-601, Built by U. S. Maritime Commission and to Whom They Were Delivered," was marked Plaintiff's Exhibit FF, for identification.)

Mr. Walkup: I now offer this in evidence as Plaintiff's Exhibit FF.

(The document heretofore marked Plaintiff's Exhibit FF for identification was offered in evidence as Plaintiff's Exhibit FF.)

Q. (By Mr. Walkup): Mr. McDonald, these documents which have been produced here this

(Deposition of R. L. McDonald.)

morning do not necessarily lead you to the conclusion, do they, that all of the AP5 vessels constructed by the Commission were necessarily constructed pursuant to the document designated as Plaintiff's Exhibit I, which was exhibited to you at the conclusion of your testimony at the last session of this deposition?

Mr. Pentz: Object to the form of the question as calling for a conclusion of the witness.

Don't these records speak for themselves? [53]

Mr. Walkup: I want this understanding clear, as far as I am concerned:

Your last question or questions at the conclusion of the preceding session of Mr. McDonald's deposition asked him if he would produce records which established in effect that all of these vessels were constructed in accordance with the letter from The Joint Chiefs of Staff calling for 130 APA's.

Mr. Pentz: That is right.

Mr. Walkup: Certain records have been produced this morning. The records speak for themselves and I would not want any inference that these records were produced to establish that fact because the witness has not so testified.

Mr. Pentz: That doesn't require any answer from him. He has not been asked that.

Mr. Walkup: Just so there won't be any misleading inference, that was my point; in view of the statements which have been made I will not press the question.

(Deposition of R. L. McDonald.)

Mr. Pentz: We cannot argue the effect of these records.

Mr. Walkup: That is right; I was not intending to at this point.

I have no further questions.

Mr. Pentz: None.

Mr. Walkup: Will the Notary Public please adjourn this proceeding then until 11 o'clock this morning when we [54] will continue with the testimony of Mr. Maher, in accordance with the previous order of the Notary Public?

The Notary Public: That is right. This proceeding is adjourned until 11 o'clock a.m., at which time the deposition of Mr. Maher will be continued.

Mr. Walkup: I would like to state at this time that it is my intention to request the Notary Public to continue with these proceedings during all regular court hours today and also if necessary commencing tomorrow morning, and to continue tomorrow morning in accordance with the notice of the depositions which stated that the depositions would be continued from day to day until completed.

Mr. Pentz: Very well; that is agreeable to me.

(Thereupon, at 9:40 o'clock a.m., the further taking of the deposition was continued to 11 o'clock a.m., October 3, 1947.)

/s/ R. L. McDONALD,

/s/ RONALD L. McDONALD.

District of Columbia,
City of Washington—ss.

I, John P. Labofish, a Notary Public within and for the District of Columbia, do hereby certify:

That prior to being examined the witness whose signature is affixed to the foregoing deposition was sworn by me to testify the truth, the whole truth and nothing but the truth; [55]

That said deposition was taken down by Chloe S. MacReynolds, an official court reporter of the District Court of the United States for the District of Columbia, in shorthand, at the time and place therein stated and was thereafter reduced to typewriting under her direction;

That Chloe S. MacReynolds, the Reporter, is a disinterested party to the cause;

That when reduced to typewriting the deposition was read by or to the said witness, who was duly informed by me of the right to make such corrections as might be necessary to render the same true and correct, and the same was thereupon signed by the said witness in my presence.

I further certify that I am not of counsel or attorney for either of the parties hereto or in any way interested in the event of this cause, and that I am not related to either of the parties thereto.

Witness my hand and seal this 30th day of October, 1947.

[Seal] /s/ JOHN P. LABOFISH,

Notary Public Within and for
the District of Columbia.

My commission expires: Dec. 14, 1947. [56]

[Title of District Court and Cause.]

DEPOSITION OF JOHN BASSETTE MAHER

Appearances:

BRUCE WALKUP,

On Behalf of Bruce Walkup; Willis S. Slusser; Thelen, Marrin, Johnson & Bridges, Attorneys for Plaintiff and Cross-Defendant, The Permanente Metals Corporation, a Corporation. [57]

ELLIOTT H. PENTZ,

On Behalf of Hill, Morgan & Farrer; Tinning & DeLap; Mellin and Hanscom, Attorneys for Defendants and Cross-Complainants, John Urquhart Birnie, an Individual Doing Business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, a Corporation.

Deposition of John Bassette Maher, taken on behalf of the plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, in Room 4705, Department of Commerce, in Washington, D. C., at 2:30 o'clock p.m., on the 1st day of October, 1947, before John P. Labofish, a Notary Public within and for the District of Columbia, pursuant to the annexed stipulation.

JOHN BASSETTE MAHER

a witness produced on behalf of the plaintiff and cross-defendant, The Permanente Metals Corpora-

(Deposition of John Bassette Maher.)

tion, a corporation, being first duly sworn to state the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

Direct Examination

By Mr. Walkup:

Q. Please state your full name.

A. John Bassette Maher.

Q. Where do you reside, Mr. Maher?

A. 313 Fourth Street, Northeast, Washington, D. C. [58]

Q. By whom are you employed?

A. The United States Maritime Commission under Civil Service appointment.

Q. Have you been designated by the Chairman of the Maritime Commission to give certain testimony in this proceeding, as one of the witnesses designated by the Chairman of the Maritime Commission to testify on his behalf? A. I have.

Q. What is your present position with the United States Maritime Commission?

A. I am presently the Acting Chief of the Materials Adjustment and Claims Unit of the Accounting Division, Bureau of Accounts, United States Maritime Commission.

Q. How long have you held that position?

A. Since July 1, 1947.

Q. Prior to that time, what was your position with the Commission?

A. I was head of the Accounts Analysis and

(Deposition of John Bassette Maher.)

Adjustment Unit of the Analysis and Statement Branch, Division of Finance, U. S. Maritime Commission.

Q. And how long have you held that position?

A. From February, 1943, until June 30, 1947.

Q. During all that time were you the head of the division?

A. From February, 1943, until April 4, 1944, I was [59] a Sub-Group Head in the same unit. In April, 1944, I was made Chief of the Unit.

Q. Will you state briefly the functions of the position of Head of the Accounts Analysis and Adjustment Unit, the position which you have testified you held prior to July 1, 1947?

A. As head of the unit, it was my responsibility to supervise, and direct an organization engaged in the analysis of accounts for the purpose of determining that costs previously recorded on the books were properly allocated as between contracts, types of vessels, ship construction (as opposed to facilities construction), and to maintain a reconciliation between the formal books of account and the records of the Construction Audit Section, another unit organization of the Commission; and to maintain a reconciliation between the Commission's books and those of the prime contractor, or the shipbuilder.

Q. By "prime contractors" or "shipbuilders," what do you mean?

A. The contractor who is employed by the Com-

(Deposition of John Bassette Maher.)

mission, such as the party to this action, The Permanente Metals Corporation.

Q. Did your duties of that position pertain to the recovery of any funds by the Maritime Commission from other sources?

A. In our analysis it was also our responsibility to determine that the costs so allocated were actually costs to be [60] absorbed by the Commission, and if we determined that they were not, but were expenses incurred by the Commission for the account of some other individual, or government agency, or private enterprise, to so separate those costs.

Q. Did you have other functions in that position?

A. Well, in the position also came the control of funds allocated by other agencies and other sources for which the Commission had a liability, an accounting liability, to determine those funds were properly accounted for, and to either bill the creditor or the debtor for any moneys due us or in the case of a creditor to refund any moneys that may be due them.

Q. Did your duties have anything to do with or pertain to the charges for particular vessels or a series of vessels built by a builder such as The Permanente Metals Corporation?

A. Oh, yes. The duties also involved the separation of costs to determine that costs for materials and supplies or other services, which went aboard or in the construction of a given vessel, or group

(Deposition of John Bassette Maher.)

of vessels, were properly established on the books with respect to that vessel or group of vessels.

Q. In that particular function did you have any responsibility for seeing that the charges for particular vessels were properly charged to particular prime contracts between the Maritime Commission and the various shipbuilders employed by it?

A. In the distribution of costs that was the main element, [61] to determine that they were actually charged to the prime contractor and contract.

Q. Did your duties of that position also include responsibility for seeing that payments made by the Commission for vessels constructed were paid from the proper funds available to the Commission for such construction?

A. Yes, sir.

Q. Will you explain in what manner your duties pertained to that subject?

A. The Maritime Commission was granted its first appropriation under the Merchant Marine Act of 1936. That Act has been supplemented and augmented from time to time and also other funds have been established and made available for the Commission from other sources. Each of those appropriations and/or allocations from the various sources was provided for a specific purpose.

Q. Referring first to the question of appropriations, what do you mean by "appropriations"?

A. Money authorized through enabling legislation to be made available to the federal agency or

(Deposition of John Bassette Maher.)

establishment for its sole use and for the specific purposes as outlined in the legislation.

Q. Are you referring to appropriations by Act of Congress?

A. Appropriations by Act of Congress of the United [62] States.

Q. Does the United States Maritime Commission have any funds established pursuant to appropriations of Congress?

A. The Maritime Commission began operating with a fund provided under the Merchant Marine Act of 1936. That fund was entitled "Construction Fund, United States Maritime Commission, Act June 29, 1936, Revolving Fund."

Q. Is that the only fund appropriated by Congress for the use of the United States Maritime Commission?

A. No, sir.

Q. Are there other funds which the Commission has available by appropriation of Congress, and with which you are familiar in your official capacity?

A. There are other funds. I would have to refer to records to describe those funds, because I was concerned primarily with the constructions features of the work.

The other funds were for features and for operations and activities apart from construction. I can't give a description of those funds today.

Q. Did the duties of your position that you held up to July 1, 1947, entail any responsibility as to seeing that the funds available to the Maritime

(Deposition of John Bassette Maher.)

Commission were used for the purpose set forth in the appropriation?

A. That, again, was one of our major functions.

Q. Did you perform that function in the position that [63] you held up until July 1, 1947?

A. I did, sir.

Q. You mentioned also in your testimony a moment ago allocations of funds to the Commission. Will you please explain in further detail the meaning of that term as you used it?

A. I can do that by example. At the inception of the Foreign Economic Administration, as the Lend-Lease activity the Maritime Commission, as the ship constructing agency of the Government, entered into agreements with the Foreign Economic Administration under which they would undertake the construction of ships to be financed through funds appropriated to the Foreign Economic Administration.

On the basis of estimates of costs, the Foreign Economic Administration made certain further allocations and placed the moneys covered by these allocations at the disposal of the Maritime Commission for us in defraying the costs of the construction.

Q. Was there more than one such allocation of funds to the Maritime Commission during your occupancy of the position you occupied up until July 1, 1947?

A. There were others. The only one that I am

(Deposition of John Bassette Maher.)

qualified to speak on at this moment is the President's Emergency Fund from which certain allocations were made for certain purposes.

Q. Were other funds from other sources made available to [64] the Maritime Commission, from other sources? A. Yes, there were.

Q. What designations were given to such funds, in your office?

A. Generally speaking they were entitled, "United States Maritime Commission Working Fund."

Q. Could you give an example of what you mean by a fund designated as "United States Maritime Commission Working Fund"?

A. Frequently, throughout the course of the war, the military establishments, such as the War, Navy, and in one or two instances I believe the Coast Guard, requested the Maritime Commission to divert certain vessels under construction, originally designed for the use of the Maritime Commission, to that agency upon completion.

After the arrangements had been completed under which the transfer, usually on a loan or loan-charter basis, was made, the Budget Officer of the Maritime Commission requested the Technical Division of the Maritime Commission to estimate the costs of the construction of the vessel or group of vessels which in themselves were only a part of a going contract.

On the basis of this estimate, the Budget Officer

(Deposition of John Bassette Maher.)

then requisitioned funds from the agency to be placed at the disposal of the Commission for the purposes of financing the costs of the construction of the vessel to be so diverted.

Q. Funds placed under such an arrangement then would [65] constitute working funds, United States Maritime Commission, as designated in your office?

A. That is right, except that title is reversed, "United States Maritime Commission Working Fund."

Q. Will you state, please, what method was employed by your office, and, when I say "your office" I refer to your office as Head of Accounts, Analysis and Adjustment Unit which you held prior to July 1, 1947, for keeping various charges for particular vessels constructed for the Commission separate from charges for other vessels constructed for the Commission?

Mr. Pentz: May I have the question read?

(Thereupon, the question was read by the reporter, as follows:)

"Question: Will you state, please, what method was employed by your office, and, when I say 'your office' I refer to your office as Head of Accounts, Analysis and Adjustment Unit which you held prior to July 1, 1947, for keeping various charges for particular vessels constructed for the Commission separate from charges for other vessels constructed for the Commission."

(Deposition of John Bassette Maher.)

Q. (By Mr. Walkup, continuing): —and also for keeping costs chargeable to particular funds separate from funds chargeable to other funds available to the Commission?

The Witness: Off the record. [66]

(Discussion off the record.)

Mr. Walkup: I will withdraw the question and reframe the question.

Q. (By Mr. Walkup): Will you state, please, what method was used in your office, as Head of the Accounts, Analysis and Adjustment Unit, to keep charges for vessels construction work done under a particular fund available for vessels construction, separate from charges against other funds available for vessels construction work?

A. There were two methods.

Q. Will you state what they were, please?

A. The first method involved definite moneys made available to the Commission, which were expended directly from that fund for construction work. I refer specifically to the construction fund which we have already identified; the Lease-Lend allocations, and a third known as the Emergency Ship Program, which was a program carried on from a Congressional appropriation to the Maritime Commission.

In accounting for those three separate funds, we had three separate and distinct sets of books.

Where the distinction is between the construction funds, from any of the three funds just mentioned.

(Deposition of John Bassette Maher.)

and a working fund, the accounting procedure is considerably different.

Q. Did you use a system of symbols in keeping funds [67] properly chargeable to the particular fund or allocation from which they were taken for ship construction?

A. Each fund was identified by a numeric, and in some instances an alphabetic, symbol.

Q. Can you explain in more detail the method in which the symbol system was used?

A. When funds are made available, either through Congressional enabling legislation for the use of the Commission for any purpose whatever, or through allocations by another government agency, or through the establishment of working funds by another government agency, the purposes and intents of those funds must be first interpreted by the Comptroller General of the United States who defines the purposes and sets up the uses of the funds involved and assigns to that fund a symbol which is from then on used in identifying or referring to the fund in question, with its description.

Q. Could you give an example of a symbol number and tie it in to the particular fund which it signifies?

A. In my previous remarks referring to the establishment of the Maritime Commission's construction fund I referred to the Construction funds, United States Maritime Commission Act, June 29, 1936, Revolving Fund. This is symbolized as 39X0200.

Q. What is the meaning of that symbol, if you

(Deposition of John Bassette Maher.)

know?

A. The first two digits to the left, "69," are indicative [68] of the agency, in this instance Maritime Commission.

The "X" denotes that it is a revolving fund. It is a no-year limitation. Balances can be carried forward into the next fiscal year without Congressional approval or Comptroller General approval.

The final four digits, "0200," are simply a serial number and have no significance.

Q. When you say "no significance," I take it they do have the significance of referring to the particular fund established by the serial number?

A. I mean that the "0200" has no significance with respect to Maritime Commission. It does have a significance, but by itself "0200" would be indicative of nothing, is what I am trying to bring out; but with the combination it definitely ties up with the construction fund.

Q. Is that symbol published annually by the Treasury Department, if you know?

A. That symbol is contained in Treasury Department publications, and appears at intervals in which the particular publication is published; I don't know the intervals.

Q. Was the symbol 69X0200 in use by the Maritime Commission during the period from February, 1943, to and including July 1, 1947?

A. Not to and including, no, sir. It was in effect from the time I took office to and including June 30, 1947. [69]

(Deposition of John Bassette Maher.)

Q. That would be from February, 1943, to and including June 30, 1947? A. Yes, sir.

Q. Will you state, please, how that symbol was used in the mechanical keeping of records of the Commission during that period?

A. As vouchers, public vouchers, were passed for payment by the Audit Division, a bookkeeping copy of that voucher, so designated by stamp, was symbolized as to the appropriation, allotment, allocation, or working fund from which the disbursement was to be made.

Q. In other words, the symbol actually appeared on the public voucher showing the particular fund to which the voucher applied?

A. That is right, sir.

Q. Did the symbol number appear elsewhere in the accounting records of the Commission?

A. The symbol number appeared in our annual statements, our financial statements, and in our books of account as identifying symbols, yes, sir.

Q. Would that symbol also appear on statements issued relating to the particular fund designated by the symbol?

A. Any time a statement was prepared to show the status of a given contract or activity that involved disbursements from funds, the symbol identified with that fund was shown on [70] the statements.

Q. What would be the use of the symbol in a typical case starting with its appearance on a

(Deposition of John Bassette Maher.)

voucher and then following through the various accounting records in your department?

A. When the bookkeeping copy is received in the Accounting Division, it flows to what is known as the Coding Unit. In the Coding Unit, the expense is classified and is coded to the definitive classification on the books to aid in the machine posting of the item to the proper account.

Q. Is that coded to each separate contract actually according to symbol number?

A. It is coded first to appropriation, or to program, as represented by the appropriation; then to the contractor; within the contractor, the contract.

Q. When you refer to contractor are you referring to a builder such as The Permanente Metals Corporation? A. I am.

Q. And when you refer to a contract are you referring to a contract such as the contract between the Maritime Commission and such a builder as Permanente? A. I am, sir.

Q. After the coding of the symbol, what, if any, function does the Analysis Unit perform with reference to the coding?

A. The original classification is made in the Coding [71] Unit for the primary purpose of recording the item on the Commission's books.

It then became the function of the Analysis Unit to review through an internal audit process all of the pre-classified items to determine that the classification accorded to them by the coding unit was the proper classification.

(Deposition of John Bassette Maher.)

Q. In other words, would it be correct to say that the Analysis Unit checked the records after they had been coded to determine that the symbols had been accurately applied with reference to the particular fund for which the appropriations were available?

A. Substitute the word "analyzed" in there and the answer is yes.

Q. In other words, the answer is correct, assuming that the question used the word "analyzed" instead of "checked"? A. That is right.

Q. Will you please explain what you mean by a public voucher?

A. There are several forms of public vouchers. They are all designated by a form number. Each for its purpose is an instrument prescribed and approved by the Comptroller General of the United States as a medium of authorizing the disbursement of funds by the Treasurer of the United States, or for the collection of funds when the situation is one between two government agencies. [72]

Q. Would the symbol number 69X0200 appear upon such public vouchers, where the public vouchers related to funds in the Construction Fund, Merchant Marine Act, 1936, Revolving Fund of the Maritime Commission? A. Yes, sir.

Mr. Pentz: May I have the question read?

(Thereupon, the following question was read by the reporter:)

"Question: Would the symbol 69X0200 ap-

(Deposition of John Bassette Maher.)

pear upon such public vouchers, where the public vouchers related to funds in the Construction Fund, Merchant Marine Act, 1936, Revolving Fund of the Maritime Commission?"

Q. (By Mr. Walkup): Referring to your previous testimony that there are various funds available to the Commission, against which charges can be made for particular vessels construction, how do you determine which fund is to be charged for particular construction?

A. By reference to the Public Law under which those funds were made available.

Q. How do you determine the Public Law under which a particular contract between the Maritime Commission and its contractor, or builder, such as Permanente, is let?

A. The Public Law under which is let a specific contract is set forth in the contract itself. [73]

Q. Is that the method followed——

A. (Interposing): By reference to the contract we determine the Public Law——

Q. Just a moment. You interrupted my question. A. Oh, I am sorry.

Q. Is that the method followed in your office, as Head of Accounts Analysis and Adjustment Unit in determining the Public Law under which a particular construction program is initiated?

A. Yes.

Q. Having determined the Public Law under which such a contract is let, how do you then deter-

(Deposition of John Bassette Maher.)

mine the appropriation available for the particular construction work under that Public Law?

A. By reference to the Public Law itself and the purposes for which it was established.

Q. I want to refer you to Maritime Commission contract designated as MCo-15762 between the Maritime Commission and the Permanente Metals Corporation. Are you generally familiar with that contract? And with the addenda thereto?

A. I am generally familiar with it, yes.

Q. Did your duties from the date of the execution of that contract in April, 1943, to July 1, 1947, include the analysis of the vessel construction costs under said contract and addenda? [74]

A. Yes.

Q. By referring to Contract MCo-15762 can you illustrate the method used by your division in determining the appropriation of funds to be charged with the costs of the construction of ships provided for under that contract, to illustrate your previous testimony? A. Yes, I can.

Q. Will you do so, please?

A. Do you want me to do so from memory or shall I refer to the contract? I can do so from memory, but I can illustrate from the contract.

Mr. Walkup: I have a photostatic copy of the contract here, Mr. Pentz. I believe you have already had access to that.

Mr. Pentz: That is true.

Mr. Walkup: And without using it as an exhibit to this deposition, and having the trouble of

(Deposition of John Bassette Maher.)

having it reproduced again, would it be agreeable that the witness refers to it without making it a part of the deposition?

Mr. Pentz: Yes, sir, that is agreeable.

Mr. Walkup: All right; thank you.

The Witness: In reading from the contract MCc15762, paragraph 1, under "Whereas," line 1 states:

"Under the provisions of Public Law 247 and 630 (77th Congress) the Commission is authorized to construct in [75] the United States Merchant vessels of such size, type and speed as it may determine to be useful," et cetera.

That, of course, becomes the basis for the determination as to what funds shall be used in financing the cost of the vessels authorized and provided for under the contract.

Reference to the Public Law recited in the contract determines the purposes for which the moneys made available by that law are to be used.

Q. (By Mr. Walkup): In what manner did you, in your office, connect the particular funds made available under the Public Laws referred to in the contract to the particular construction fund available in the Commission for the construction?

A. Reference to the language of Public Law 247 will disclose that it is referred to as a supplemental appropriation to the appropriation made available through the medium of the Merchant Marine Act of 1936 and supplemental appropriations.

(Deposition of John Bassette Maher.)

Q. Is the same true with reference to Public Law 630 (77th Congress)?

A. Public 630 (77th Congress) refers to Public Law 247 and to the Merchant Marine Act of 1936, as well as to the Independent Offices Appropriation Act, which we haven't heretofore mentioned, but which is a supplemental vehicle to the original Act.

Q. To summarize your testimony then, is it correct that in determining the particular funds to be used for vessels [76] construction work you first refer to the particular contract and to the recitation therein of the Public Law or Laws under which the contract is let, and from that turn to the Public Law or Laws specified in the contract, and through analysis of the Public Law or Laws then determine the particular fund into which the funds made available by the Public Law or Laws, is placed?

The Witness: Will you read the question, please?

(Thereupon, the following question was read by the reporter:)

“Question: To summarize your testimony then, is it correct that in determining the particular funds to be used for vessels construction work you first refer to the particular contract and to the recitation therein of the Public Law or Laws under which the contract is let, and from that turn to the Public Law or Laws specified in the contract, and through analysis of the Public Law or Laws then determine the particular fund into which the funds made

(Deposition of John Bassette Maher.)

available by the Public Law or Laws, is placed?"

A. That is the procedure.

Q. (By Mr. Walkup): Is that the procedure that was followed in your office with reference to contract MCc 15762?

A. That is the procedure that was followed in reference to that contract. [77]

Q. Having made such determination, how did you then in turn connect the particular funds with the particular symbol number for the funds?

A. By reference to the Accounts and Procedures Letter issued by the Comptroller General of the United States establishing the symbol for that fund.

Q. I refer you now to contract designated as MCc36452 between United States Maritime Commission and the Permanente Metals Corporation, and ask you if you are generally familiar with that contract and the addenda thereto?

A. I am generally familiar with that contract.

Q. Did your duties from the date of the execution of that contract on April 1, 1945, to July 1, 1947, include the analysis of vessels construction costs under said contract as amended?

A. They did.

Q. By reference to Contract MCc36452 will you illustrate the method used by your division in determining the appropriation of funds to be charged with the costs of the construction of the ships provided for under that contract? A. I can.

Q. Will you do so, and for your convenience in

(Deposition of John Bassette Maher.)

doing so I will hand you a photostatic copy of the contract MCc36452.

Mr. Walkup: Mr. Pentz, will it also be agreeable that we don't have to attach this copy of the contract as an exhibit to [78] this deposition?

Mr. Pentz: That is agreeable.

The Witness: By reference to Contract MCc-36452, paragraph 1, under "Whereas" reads:

"Under the provision of Public Law 247 (77th Congress) the Commission is authorized to construct in the United States merchant vessels of such type, size and speed as it may determine to be useful," et cetera.

By reference to the Public Law cited it was determined that the construction authorized and provided for under the contract was to be financed from the construction fund of the United States Maritime Commission.

Q. (By Mr. Walkup): Was that determination made in the same manner as the determination was made under Contract MCc15762?

A. In the identical manner.

Q. As you have previously testified?

A. And as I have previously testified, yes.

Q. Do you know of your own knowledge to what appropriation of Congress the costs of construction of the vessels constructed under Contract MCc15762 were charged by the United States Maritime Commission on its books?

A. I do.

Q. To what appropriation were the costs of construction charged? [79]

(Deposition of John Bassette Maher.)

A. To the Construction Fund, United States Maritime Commission, Act of June 29, 1936, Revolving Fund, symbolized as 69X0200.

Q. Do you know of your own knowledge as to what appropriation of Congress the costs of construction of the vessels constructed under Contract MCc36452 were charged by the United States Maritime Commission? A. The same.

Q. Will you state, please, to what appropriation that was?

A. Construction Fund, United States Maritime Commission, Act of June 29, 1936, Revolving Fund, symbolized as 69X0200.

Q. Were all of the vessels constructed under Contract MCc15762, that is, Maritime Commission hull numbers from 525 to 601, inclusive, completed and paid for under that contract? A. No, sir.

Q. To what extent were they not completed and paid for under that contract?

A. Under the provisions of Addendum No. 3 to Contract MCc15762 the contract was modified to include only the construction of those hulls which were completed at the time of the execution of the addendum; that is, Hulls MC536 to 545——

Q. Inclusive?

A. Inclusive; and Hulls 552 to 573, inclusive, in all 32 vessels. [80]

Q. What procedure was followed by the Maritime Commission as to the allocation of costs for the 32 vessels which were completed under Contract MCc15762?

(Deposition of John Bassette Maher.)

A. As the costs were paid to the contractor based on completed work, these costs were accumulated on the Commission's books of account as direct costs of construction to the Commission.

Q. What accounting procedure was followed by the Commission to your knowledge at the time that Addendum 3 to Contract MCc15762 became effective?

A. To begin with, Addendum 3 to Contract MCc15762, in addition to establishing the total contract price for the 32 vessels, also stipulated that all costs recorded against the contract MCc15762 in excess of the total contract price for the 32 vessels, which was established at \$89,500,000, were to be transferred and absorbed by Contract MCc36452, and were to be considered as the costs recorded to date against the remaining 45 vessels originally contracted for under Contract MCc15762.

Those adjustments were made on the Commission's books of account as a result of which those accounts now reflect the total adjusted costs of both contracts, 15762 at \$89,500,000; 36452 I will have to refer to my records to give you the exact figure; it was substantially \$56,000,000 which was transferred from the first contract, MCc15762 to the new contract, MCc36452.

Q. By way of summary, would it be correct to say, then, [81] that before Addendum 3 to MCc15762 became effective, the costs which had been accumulated under Contract MCc15762 amounted to ap-

(Deposition of John Bassette Maher.)

proximately \$89,500,000 plus approximately \$56,000,000 in addition thereto?

A. That is roughly correct.

Q. And that the Commission then charged on its books as the cost to the Commission of Contract MCc15762 for the 32 vessels completed thereunder, the sum of \$89,500,000 and transferred the remaining \$56,000,000 approximately, to the new vessels contract No. MCc36452? A. That is correct.

Q. What did the figure of approximately \$56,000,000, which was transferred to Contract MCc36452 represent?

A. It represented the difference between the recorded costs to date against the entire 77 vessels originally provided for under Contract 15762, and the \$89,500,000 which was determined by Commission action in Addendum No. 3 to be the total contract price for the 32 vessels completed as at the date of the execution of Addendum No. 3.

Q. Would it be correct to say, then, that the approximately \$56,000,000 which was carried over to Contract MCc36452, as you have testified, represented costs chargeable against the remaining 45 vessels which were originally under MCc15762; that is, Hulls 525 to 535 inclusive; 546 to 551, inclusive; and, 574 to 601, inclusive? [82]

A. That is in accordance with the terms of Addendum No. 3 of the contract.

Q. And from an accounting standpoint that is the way the transaction was handled on the Commission's books, to your knowledge, is it not?

(Deposition of John Bassette Maher.)

A. That is correct.

Q. Were all of the vessels designated by Commission Hull numbers as 525 to 601, inclusive, completed under either MCc15762 or MCc36452?

A. All of the vessels within the sequence named were completed under the two contracts.

Q. Were all of the payments made by the Maritime Commission to the builder, The Permanente Metals Corporation, for the vessels designated as Maritime Commission hulls Nos. 525 to 601, inclusive, charged by the Maritime Commission to the Construction Revolving Fund established under the Merchant Marine Act of 1936?

Mr. Pentz: I would like to ask the witness a question on voir dire.

Mr. Walkup: All right.

Mr. Pentz: You have understood that question, haven't you, sir?

The Witness: Yes, sir.

Mr. Pentz: Is it not a fact that the information necessary for you to answer that question is contained in books and [83] records in your department?

The Witness: That is true.

Mr. Pentz: And those books and records are under your control and custody?

The Witness: During the time under discussion, they were.

Mr. Pentz: I object to the form of the question under the circumstances as calling for secondary evidence. Off the record.

(Deposition of John Bassette Maher.)

(Discussion off the record.)

Mr. Pentz: I will withdraw the objection.

The Witness: The answer is no. For the purposes of the record, I would like to say that when I say an item of cost was charged to an appropriation, that is to be taken to mean that it was paid from that appropriation. In the terminology used in the accounting organizations the cost was charged to a specific account on our books. The money that you have reference to, or the payments that you refer to, were all paid from the Construction Fund, United States Maritime Commission, Act of June 29, 1936, Revolving Fund, symbolized as 69X0200.

Q. (By Mr. Walkup): Was there any change made in the fund charged by the Maritime Commission when making such payments to Permanente after Addendum No. 1 to Contract MCCc15762 was adopted?

Mr. Pentz: Off the record.

(Discussion off the record was had.) [84]

The Witness: The answer is no.

Q. (By Mr. Walkup): Was there any change made in the fund charged by the Maritime Commission for payments made to Permanente after Addendum No. 2 to Contract MCCc15762 was adopted? A. No, sir.

Q. Was any change made in the fund charged by the Maritime Commission for payments to Permanente after Addendum No. 3 to Contract 15762 was adopted? A. No, sir.

(Deposition of John Bassette Maher.)

Q. Was any change made in the fund charged by the Maritime Commission for payments to Permanente after Addendum No. 1 to Contract MCo36452 was adopted? A. No, sir.

Q. To what extent, if any, did the United States Maritime Commission recover any part of the cost of the construction of vessels designated as Maritime Commission Hulls Nos. 525 to 601, inclusive, from any other source?

A. To refer to my previous testimony, at the time the Navy asked that the vessels 536 to 545, inclusive, and 552 to 573, inclusive, be diverted to them upon completion on a loan basis, the Technical Division was requested to prepare cost estimates for that group of vessels, which included the change in design or conversion costs provided for under Addendum No. 2 to Contract 15762. [85]

On the basis of those estimates, the Navy was requested and did make available to the Maritime Commission a sum of money which was arrived at by multiplying the vessel conversion costs total by 22.

These funds were then established under the Commission's control and were set up in a reserve account.

Q. Mr. Maher, you mentioned two series of vessels in the case of which the Maritime Commission recovered part of the costs of construction of the vessels from another source.

Let's take first the case of the ten hulls designated as Maritime Commission Hulls Nos. 536 to 545, inclusive: To what extent, if any, did the Maritime

(Deposition of John Bassette Maher.)

Commission recover any part of the cost of the construction of those vessels numbered 536 to 545 from any other source?

A. The Maritime Commission did not receive in reimbursement any part of the construction costs of vessels hulls MC536 to 545, inclusive.

The Maritime Commission did receive from the Navy Department reimbursement for the cost of delivery only of those ten vessels.

The vessels were completed in accordance with the original design, and there was no conversion to military type involved.

Q. Then, as to the ten Maritime Commission hulls, numbered 536 to 545, the only funds which were paid to the Maritime Commission by the Navy were the costs of delivery of those vessels to the [86] Navy? A. That is correct.

Q. How was that reimbursement actually accomplished?

A. The delivery costs, which involved the use of tugs, was provided by the Resident Auditor in the shipyard and furnished to the Assistant General Auditor of Construction, who in turn forwarded it to the Accounts Division with a request that the Navy be billed for the specific amount. This was done and the billing was honored and the Revolving Fund was reimbursed.

Q. I hand you a document bearing date of March 6, 1945, and ask you please to identify that document.

A. That is a memorandum to the Assistant General Auditor of Construction from the Resident

(Deposition of John Bassette Maher.)

Auditor at Permanente Metals Yard No. 2, Richmond, California, which details the cost of delivery tug boat service expressed in hours and rate per hour for Maritime Commission Hulls 536 through 545, inclusive.

Q. What was the total amount of the charges for the delivery? A. \$1,529.50.

Q. Is that document a true copy of the copy appearing in the accounting records of the Commission relating to that transaction? A. It is.

Q. And is that a record maintained in the accounting procedure followed by the Commission in its performance of its [87] functions with relation to vessels Contract MCc15762?

A. It is in the sense that it becomes the support for the claim against the Navy and is retained with the supporting document in the accounting files.

Q. Was that document received in the office of the Resident Auditor in the usual course of Commission business?

A. It was developed in the office of the Resident Auditor and received in the office of the General Auditor of Construction during the routine course of business.

Mr. Walkup: May I have that marked for identification as Plaintiff's Exhibit V to the deposition of Mr. Maher?

(Certified photostatic copy of letter dated March 6, 1945, from C. L. Shaff to Frank L. Lynch (General Auditor) marked Plaintiff's Exhibit V for Identification.)

(Deposition of John Bassette Maher.)

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit V.

(The letter heretofore marked Plaintiff's Exhibit V for Identification was offered in evidence as Plaintiff's Exhibit V.)

Q. (By Mr. Walkup): Mr. Maher, I now show you a document bearing date of March 12, 1945, and ask you please to identify that document.

A. That is an office memorandum of transmittal to the General Auditor, to the attention of the Head of our Accounts Receivable Branch, and from the Assistant General Auditor of [88] Construction, which request that the General Auditor bill the Navy Department for the delivery charges of the ten vessels MC Hulls Numbered 536 to MC545, inclusive.

Q. Is that also a document the original of which is on file in the accounting records of the Commission?

A. That is correct.

Q. Is it an official record of the Accounting Division of the Commission?

A. It is.

Q. Is it a document sent and received in the usual course of official business of the Maritime Commission?

A. It is.

Mr. Walkup: Would you please mark this for identification as Plaintiff's Exhibit W.

(Certified photostatic copy of letter dated March 12, 1945, from Assistant General Auditor of Construction to General Auditor, was marked Plaintiff's Exhibit W for Identification.)

(Deposition of John Bassette Maher.)

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit W.

(Office memorandum heretofore marked Plaintiff's W for Identification was offered in evidence as Plaintiff's Exhibit W.)

Q. (By Mr. Walkup): I hand you now a document headed "Remittance Manifest," [89] and ask that you please identify that for the record.

A. This is a covering document for the remittance requested in the previous exhibits.

Mr. Walkup: Would you please mark this for identification as Plaintiff's Exhibit X.

(Certified photostatic copy of remittance manifest dated 7-28-1945 marked Plaintiff's Exhibit X for Identification.)

Q. (By Mr. Walkup): With reference to Plaintiff's Exhibit X for Identification, would you please explain what a remittance manifest is and how it is used in the accounting procedure of the Commission?

A. When a remittance is received by the Commission from any source whatever it comes in the form of a check—in some isolated instances in cash—but in all instances where another government department is concerned it is through a check from the Treasury Department.

For the accounting procedure it is necessary to record that remittance on its books but the check itself does not pass through the accounting department.

(Deposition of John Bassette Maher.)

That is deposited immediately by the Collections Department and a remittance manifest is prepared, which is then circulated through the organization or unit, to the Accounts Branch, where it is used as the accounting media for recording the collection on the Commission's books of account. [90]

Q. Is this remittance manifest, or rather the original of which this is a copy, an official record of the Maritime Commission? A. It is.

Q. And is a remittance manifest of this character prepared in the usual course of the official business of the Commission? A. It is.

Q. And is the original of this document on file in the official records of the Commission?

A. It is.

Q. I call your attention to the fact that the symbol number 69X0200 appears on the remittance manifest in two places. Will you explain the significance of the appearance of that symbol?

A. That means that that money was covered into the construction fund when it was deposited in the Treasury. That is, it was placed to the credit of the construction fund when it was covered into the Treasury.

Q. That construction fund is designated as what?

A. Construction Fund, United States Maritime Commission, Act of June 29, 1936, Revolving Fund.

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit X.

(The remittance manifest heretofore marked Plaintiff's X for Identification was offered in evidence as Plaintiff's Exhibit X.) [91]

(Deposition of John Bassette Maher.)

Q. (By Mr. Walkup): I hand you now a document bearing date of April 11, 1945, and ask you please to identify that document.

A. This is the formal invoice filed with the Navy by the Maritime Commission and is the transaction occurring prior to the previous exhibit. It is the basis for the remittance covered by the previous exhibit.

Mr. Walkup: Will you please mark that for identification as Plaintiff's Exhibit Y.

(Certified photostatic copy of invoice dated April 11, 1945, marked Plaintiff's Exhibit Y for Identification.)

Q. (By Mr. Walkup): Referring to Plaintiff's Exhibit Y for Identification, is that document, of which the exhibit is a copy, an official record of the Maritime Commission? A. It is.

Q. Is the invoice of which it is a copy prepared in the usual course and procedure of the Commission's business? A. It is.

Q. And is the original of this invoice on file with the other accounting records of the Commission? A. It is.

Q. I call your attention to the fact that the symbol 69X0200 appears on the invoice. What is the significance of [92] that?

A. That is to guide the deposit when the remittance is received.

Q. And is that to guide the deposit to the particular fund which you have already testified symbol 69X0200 designates? A. That is correct.

(Deposition of John Bassette Maher.)

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit Y.

(The invoice heretofore marked Plaintiff's Exhibit Y for Identification was offered in evidence as Plaintiff's Exhibit Y.)

Q. (By Mr. Walkup): I hand you now a document headed "Voucher for Transfers Between Appropriations and/or Funds," bearing date April 11, 1945. Would you please identify that document?

A. This document is a public voucher that is prepared simultaneously with and accompanies the previous exhibit. It is used wherever funds are transferred between federal appropriations.

Mr. Walkup: Would you please mark that as Plaintiff's Exhibit Z for Identification?

(Certified photostatic copy of "Voucher for Transfers Between Appropriations and/or Funds," marked Plaintiff's Exhibit Z, for Identification.)

Q. (By Mr. Walkup): Is this document an official record of the United [93] States Maritime Commission? A. It is.

Q. Is this type of document customarily prepared in the official business of the Maritime Commission with reference to accounting?

A. As between federal agencies, yes.

Q. And is the original of this document on file in the files of the United States Maritime Commission?

A. I am going to have to qualify my answer.

(Deposition of John Bassette Maher.)

The original of that document is not retained in the office of the Maritime Commission. It is in the Office of the Treasury and the bookkeeping copy is a part of the records of the Maritime Commission and is also on file to support our records and this is a copy of the copy retained.

Q. And is that the usual and customary procedure of the Maritime Commission with reference to such vouchers, that is, to retain one copy in its possession and send one copy forward?

A. We retain more than one copy. We retain a memorandum copy, but we retain an accounting copy or the bookkeeping copy also, which is made a part of the bookkeeping and accounting records of the Commission. That is a copy of that copy.

Q. I call your attention to the fact that this document bears the symbol 69X0200 "Construction Fund, United States Maritime Commission, Act of June 29, 1936, Revolving Fund." What is the significance of that symbol and identification? [94]

A. That indicates that the office that is doing the billing is going to deposit the collection when received in the "Construction Fund, United States Maritime Commission, Act of June 29, 1936, Revolving Fund, 69X0200."

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit Z.

(The Voucher for Transfers Between Appropriations and/or Funds, heretofore marked Plaintiff's Exhibit Z for Identification, was offered in evidence, as Plaintiff's Exhibit Z.)

(Deposition of John Bassette Maher.)

Q. (By Mr. Walkup): With reference to Hulls numbered 536 to 545, inclusive, did the Maritime Commission receive any funds whatsoever from the Navy Department, except the sum of \$1,529.50 to cover delivery charges as shown by the previous five exhibits? A. No, sir.

Q. Referring to the series of Maritime Commission Hulls numbered from 552 to 573, inclusive, concerning which you have previously testified, will you state further the manner in which the Maritime Commission received or recovered any funds from the Navy Department relating to these vessels?

A. I am not exactly clear as to how far I covered this in my previous testimony. I think I had better revamp it.

Q. I think it would be well. The other answer was not responsive to my question, and I think it would be well to start [95] anew and explain it.

Mr. Pentz: Just a minute. I am going to interpose a technical objection, to the question, on the basis it calls for an answer argumentative in nature.

The Witness: Off the record.

(Discussion off the record was had.)

The Witness: At the time arrangements were completed between the Maritime Commission and the Navy Department for the conversion of MC hulls 552 to 573, inclusive, the Technical Division of the Maritime Commission was requested to and did furnish the estimated costs of the conversion.

On the basis of this estimate the Budget Officer of the Maritime Commission requisitioned funds.

(Deposition of John Bassette Maher.)

through formal invoices and vouchers, from the Navy Department, to cover the costs of the conversion.

Upon receipt of these funds they were deposited in the Treasury under United States Maritime Commission Working Funds symbol 69X5900.056. At this time they were set up on the Commission's formal books of account as a reserve.

At the time of the analysis of the Commission's vessel construction cost account, it was determined that certain moneys disbursed from the Construction Fund were actually and properly chargeable to the cost of the conversion of MC Hulls 552 to 573, inclusive.

On the basis of this analysis and technical estimates, a [96] public voucher requesting the transfer of funds from the United States Maritime Commission Working Fund symbol 69X5900.056 to Construction Fund, United States Maritime Commission, Act of June 29, 1936, Revolving Fund, was issued.

This document became the basis for the actual transfer of the funds requested, and upon receipt of the accomplished documents, the funds were deposited in the Construction Fund.

Q. Relating to the conversion features of vessels 552 to 573, was the initial payment for those conversion features handled any differently by the Commission than the payment by the Commission for any other features of the vessels? A. No, sir.

Q. Against what Commission fund were the

(Deposition of John Bassette Maher.)

conversion charges for Hulls numbered 552 to 573 charged by the Commission?

A. Construction Fund, United States Maritime Commission, Act of June 29, 1936, Revolving Fund, 69X0200.

Q. Can you tell us the meaning of the symbol 69X5900.056?

A. The "69" is indicative of the agency, in this instance the Maritime Commission.

The "X" is indicative of the longevity of the appropriation involved. In other words, in this instance it is a no-year appropriation.

The "5900" is your serial.

"056" is your decimal limitation. It definitely limits the use of the funds under that symbol. [97]

Q. The reserve which you mentioned that the Commission set up upon receipt of the funds from the Navy was designated symbol 69X5900.056?

A. That is correct.

Q. And what type of fund would you call that?

A. That is a working fund.

Q. In line with your previous testimony earlier in the deposition?

A. That is correct.

Q. You have mentioned the transfer of funds from the Working Fund 69X5900.056 to the Revolving Fund, symbol 69X0200. On how many occasions was that type of transfer accomplished with reference to Hulls numbered 552 to 573?

A. Twice.

Q. What determined the time when such transfers were made?

(Deposition of John Bassette Maher.)

A. We normally clear our accounts on a quarterly basis. That was purely arbitrary and was not strictly adhered to.

The Notary Public: The witness is now excused until 10 o'clock tomorrow morning.

(Thereupon, at 5 o'clock p.m., the further taking of depositions was continued until October 2, 1947, at 10 o'clock a.m.) [98]

Thursday, October 2, 1947

(The further taking of the deposition of the witness John Bassette Maher was resumed at 9 o'clock a.m.; the parties present being Bruce Walkup, Attorney in behalf of the Plaintiff and Cross-Defendant, The Permanente Metals Corporation, a corporation; Mr. Elliott H. Pentz, Attorney on behalf of the Defendants and Cross-Complainants, John Urquhart Birnie, an individual doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company; The Notary Public, John P. Labofish; the Reporter, Mrs. Chloe S. MacReynolds; and the witness, John Bassette Maher.)

The Notary Public: Mr. Maher, you are reminded that you are still under oath.

JOHN BASSETTE MAHER

a witness produced on behalf of the Plaintiff and Cross-Defendant, The Permanente Metals Corpora-

(Deposition of John Bassette Maher.)

tion, a corporation, having been previously sworn to state the truth, the whole truth, and nothing but the truth, testified further on his oath as follows:

Direct Examination

By Mr. Walkup:

Q. I hand you now a document bearing date of June 6, 1945, and entitled "Voucher for Transfers Between Appropriations and/ or Funds." [99]

Will you briefly identify what that document is and then I will ask you some further questions concerning it.

A. This document is again, a public voucher used as a medium for requesting and securing and exchanging funds between federal agencies and appropriations.

Q. What is the date of the document?

A. June 6, 1945, was the date on which it was prepared and passed by the Department.

Q. Does it consist of more than one sheet?

A. It consists of two sheets; the basic sheet of the document form supported by a schedule of the amount to be transferred.

Mr. Walkup: I ask that it be marked for identification as Plaintiff's Exhibit AA.

(Certified photostatic copy of Voucher for Transfers Between Appropriations and/or Funds, dated June 6, 1945, marked Plaintiff's Exhibit AA for Identification.)

Q. (By Mr. Walkup): Referring further to

(Deposition of John Bassette Maher.)

Plaintiff's Exhibit AA for identification, will you please explain the reference to the symbol numbers 69X0200 and 69X5900.056 appearing on the face of the voucher?

A. In the upper block the use of the symbol 69X0200 (the upper block being the block to enter the information necessary for the accounting of the funds by the billing office) [100] the use of the symbol indicates the fund to the credit of which the moneys are to be deposited in the Treasury of the United States upon collection.

Under the lower block, office to be billed, the use of the symbol 69X5900.056 indicates the fund from which the disbursement is to be made.

Q. Are both funds 69X0200 and 69X5900.056 funds maintained by the Maritime Commission?

A. Yes, sir.

Q. The designation "69" in each symbol refers to the Maritime Commission, does it not?

A. That is right, sir.

Will you repeat the last question, please?

(Thereupon, the last question was read by the reporter, as follows:)

"Question: The designation '69' in each symbol refers to the Maritime Commission, does it not?"

The Witness: That is correct.

Q. (By Mr. Walkup): This document marked Plaintiff's Exhibit AA for identification is an official record of the Maritime Commission, is it not?

A. That is correct, sir.

(Deposition of John Bassette Maher.)

Q. And when I say "this document" I refer of course to the document of which this is a photostatic copy? [101] A. That is correct.

Q. Are documents of this character kept in the usual course of accounting procedure of the Commission?

A. Where the transaction is between federal agencies and/or appropriations.

Q. And the original document, of which this is a copy, is a record of the Maritime Commission, is it? A. It is, sir.

Q. Would you please explain the meaning of the schedule and in particular the reference to "California;" "Permanente;" "Kaiser Co.;" "Oregon"?

A. The schedule itself is a compilation of estimated costs prepared by the Technical Division as a basis for recovery of the conversion features of those costs from the Navy Department.

The distribution of the charges as between shipyards is due to the fact that the working fund, symbolized as 69X5900.056 was provided to finance the costs of the conversion features, of MC Hulls 552 to 572, inclusive, in addition to hulls under construction at other yards and under other contracts.

The amounts distributed are based on the individual hull cost, with respect to the conversion features times the number of hulls being constructed in the given yard.

Following that, Permanente Metals Corporation, under this particular analysis and involving the

(Deposition of John Bassette Maher.)

particular conversion [102] features, is having allocated to its contract the sum of \$22,582,500 representing 15 vessels.

Q. In your answer you referred to other builders for the Commission. Do the other builders have any identification with the words "California;" "Kaiser Co.;" and "Oregon" and if so, what connection?

A. If I follow your question, California Shipbuilding Corporation is a builder employed under contract by the Maritime Commission for the construction of vessels in the same manner as is The Permanente Metals Corporation, the Kaiser Company, and the Oregon Shipbuilding Corporation.

Q. Does the word "California" then refer to California Shipbuilding Corporation?

A. It is expressed "California S. B. Corporation" which indicates California Shipbuilding Corporation.

Q. And does the word "Kaiser Co." refer to Kaiser Company, Inc., another contractor for the Maritime Commission?

A. That is correct.

Q. And does the word "Oregon" refer to the Oregon Shipbuilding Corporation, another contractor for the Maritime Commission?

A. "Oregon S. B. Corporation" stands for Oregon Shipbuilding Corporation, another contractor.

Q. To further clarify this schedule, under the name of each builder appears a series of numbers. Do those numbers [103] represent the Maritime Commission hull numbers under contract by the

(Deposition of John Bassette Maher.)

Commission's builders designated, that is, California, Permanente, Kaiser Company and Oregon, respectively?

A. In the top assembly of numbers the numbers listed under the individual shipyards named represent the hull numbers involved in this particular cost analysis being built by the shipyard indicated by the name directly above the assembly of numbers.

Q. In other words, would it be correct to say that this voucher, which is for a total sum of \$143,-889,000 covers a transfer from fund 69X5900.056 to fund 69X0200 relating to costs incurred by the Commission under contracts with California Shipbuilding Corporation; the Permanente Metals Corporation; Kaiser Company, and Oregon Shipbuilding Corporation? A. That is correct.

Q. This transaction was handled then by one voucher, rather than by separate vouchers for each particular contractor with the Commission mentioned in those four names?

A. That is correct.

Q. This covers, in the case of Permanente, 15 vessels with hull numbers as designated under the column "Permanente"? A. That is correct.

Q. Do you know hull numbers in the case of Permanente or can you tell the hull numbers from the exhibit?

A. The hull numbers there represent 15 of the 22 hulls [104] under this particular contract. Off the record.

(A discussion off the record was had.)

(Deposition of John Bassette Maher.)

Mr. Walkup: Is it understood the witness can read from the original rather than from the photostatic copy, and that no objection is made on those grounds?

Mr. Pentz: None whatever.

The Witness: We have here Hulls 552 to 556. That is a sequence of five hulls.

571 to 573——

Q. (By Mr. Walkup): Just so there will be no question about it, the particular hulls listed under Permanente then are 552 to 556; 558, 560, 562, 564, 567, 569, 571 to 573 and 565: Is that correct?

A. That is correct, with the word "inclusive," after "571 to 573," and after "552 to 556."

Mr. Walkup: I offer the exhibit now marked for identification as Plaintiff's Exhibit AA, in evidence. Mr. Pentz, is there any objection on the grounds the questions I have been asking about the document were asked prior to the offer in evidence?

Mr. Pentz: None, on this condition: That if I have erred likewise in the taking of the deposition of the Secretary of the Navy it be understood now you make the same waiver of objection for my benefit.

Mr. Walkup: That would apply, then, to the previous [105] exhibits that I have introduced, as well?

Mr. Pentz: In all cases.

Mr. Walkup: In other words, if I questioned a witness about a document, other than merely laying the foundation for the document before offering

(Deposition of John Bassette Maher.)

it in evidence, no objection will be made on that ground alone, assuming that the document is later offered in evidence?

Mr. Pentz: None, on the condition that it appear now that you so agree in my case in so far as my conduct as you described in your own case bears to the taking of the deposition of the Secretary of the Navy.

Mr. Walkup: That is correct.

Mr. Pentz: Very well.

(Voucher heretofore marked Plaintiff's Exhibit AA for Identification, was offered in evidence as Plaintiff's Exhibit AA.)

Q. (By Mr. Walkup): Getting back, then, to this Exhibit AA, and referring further to the schedule, under the column "Permanente," the second column "Conversion Costs Per Vessel," will you explain please the meaning of that?

A. The original contract stipulated a total contract price for the construction of the entire group of vessels in accordance with the original design.

After the contract had been in process for some time, arrangements were made with the Navy Department to transfer [106] certain of these vessels upon completion to the Navy Department on a loan basis.

It was further agreed that certain changes in design or conversions would be incorporated in the vessel prior to its completion and delivery to the Navy Department. The incorporation of the con-

(Deposition of John Bassette Maher.)

version features entailed additional construction expense, which the Navy agreed to bear.

The Maritime Commission, through its Technical Division, established an estimated cost of the conversion features. Those costs were distributed among the various elements of cost, material, labor, overhead and profit, arriving at a unit cost per vessel of the conversion features.

Q. Do the figures shown in the column under the heading "Permanente" opposite the heading "Conversion Costs Per Vessel," that is, material, \$590,000; labor, \$516,000; overhead, \$345,000; and profit, \$54,500, or a total figure of \$1,505,500, represent the estimate of the Maritime Commission, Technical Division, per vessel, for the conversion costs of making the conversion of the original Maritime Commission hulls to the hulls incorporating certain other features? A. That is correct.

Q. Was the cost of the conversion features kept separately for each vessel?

A. Not on the records of the Maritime Commission.

Q. Does the figure \$1,505,500 just mentioned represent [107] an estimate per vessel for each of the vessels designated by the hull appearing first under the heading "Permanente" for conversion costs?

The Witness: Will you please repeat the question?

(Pending question read.)

The Witness: It does.

(Deposition of John Bassette Maher.)

Q. (By Mr. Walkup): So that the total estimated cost of the conversion features for the 15 vessels designated is shown in the column headed "Total Conversion Cost by Yards," under the heading "Permanente" to be \$22,582,500?

A. That is right.

Q. Was that sum, together with other sums totalling \$143,889,000 covered by this voucher designated as Plaintiff's Exhibit AA?

A. It was.

Q. Is it also true that in each case the Commission originally paid those costs for conversion features out of fund 69X0200?

A. That is correct.

Q. You mentioned in your previous testimony that on two occasions transfers of funds were made to fund 69X0200 from fund 69X5900.056; was the first occasion the occasion represented by Exhibit AA?

A. It was. [108]

Q. And that was on June 6, 1945?

A. That is correct.

Q. Following June 6, 1945, what method was used for the payment of the conversion costs to and including the time of the making of the second transfer of funds?

A. The conversion cost was continually charged throughout the life of the contract to the Construction Fund, symbolized as 69X0200.

Q. I hand you now a document bearing date of January 22, 1946, headed "Vouchers for Transfers."

(Deposition of John Bassette Maher.)

Will you please identify briefly that document for the record?

A. This is a public voucher used to effect transfers of moneys between federal appropriations and agencies.

Q. Does the document consist of more than one page?

A. The document consists of the basic document and a supporting schedule.

Q. Is that document substantially the same type of document as Plaintiff's Exhibit AA?

A. It is identical to Plaintiff's Exhibit AA.

Q. Is it identical even as to the writing of figures or do you mean identical in effect?

A. I misunderstood the question. It is identical in its effect with Plaintiff's Exhibit AA.

Mr. Walkup: May I have this document marked for identification as Plaintiff's Exhibit BB? [109]

(Certified photostatic copy of Voucher for Transfers Between Appropriations and/or Funds marked Plaintiff's Exhibit BB for Identification.)

Q. (By Mr. Walkup): Is the document of which this is a copy an official record of the Maritime Commission? A. That is correct.

Q. Is a record of this character kept in the regular course of official business of the Maritime Commission? A. It is.

Q. And is the document, of which this is a photostatic copy, on file in the records of the Maritime Commission? A. It is.

(Deposition of John Bassette Maher.)

Mr. Walkup: I offer this in evidence as Plaintiff's Exhibit BB.

(The voucher heretofore marked Plaintiff's Exhibit BB for Identification was offered in evidence as Plaintiff's Exhibit BB.)

Q. (By Mr. Walkup): Referring further to Plaintiff's Exhibit BB, would you explain please the meaning of the use of the two symbols numbered 69X0200 and 69X5900.056 appearing on the voucher?

A. On the document under the upper block, entitled "Accounting Classification (for completion by the billing office)," the use of the symbol 69X0200 is to indicate the appropriation [110] or fund to the credit of which the collection is to be deposited.

In the lower block, entitled "Accounting Classification (For completion by the Office Billed)," the use of the symbol 69X5900.056 is to indicate the fund from which the disbursement is to be made.

Q. Does the voucher then represent a transfer of the \$32,173,500 from fund 69X5900.056 to fund 69X0200? A. It does.

Q. Referring now to the second page of the exhibit, will you please explain the meaning of the headings for the four columns, which are headed "California;" "California;" "Permanente;" and "Vancouver" opposite the title "Builder"?

A. In this instance the use of the titles "California" represents a combination of the two first

(Deposition of John Bassette Maher.)

designations. "California" to the left represents the total moneys paid to the California Shipbuilding Corporation.

Q. I don't believe I made my question clear. Does the word "California" appearing first following the word "Builder" refer to California Shipbuilding Corporation? A. It does.

Q. Does the second word "California" appearing opposite the word "Builder" likewise refer to the California Shipbuilding Corporation?

A. It does. [111]

Q. Does the word "Permanente" refer to The Permanente Metals Corporation? A. It does.

Q. Does the word "Vancouver" refer to Kaiser Co., Inc., Vancouver shipyard? A. It does.

Q. Opposite the heading "Outfitter" does the word "Moore D. D." refer to——

A. Moore Dry Dock Company, of Oakland, California, it does.

Q. Does the word "Vancouver" opposite the heading "Outfitter" refer to Kaiser Co., Inc., Vancouver Shipyard? A. It does.

Q. Does the word "Richmond #3" opposite the word "Outfitter" refer to Kaiser Co., Richmond Shipyard #3? A. It does.

Q. Does the word "Vancouver" appearing opposite the word "Outfitter" refer to Kaiser Co., Inc., Vancouver Shipyard? A. It does.

Q. What is the distinction, if you know, between

(Deposition of John Bassette Maher.)

the term "Builder," and "Outfitter," as used in the document?

A. Specifically I am not prepared to answer the question.

Q. Referring now to the heading "Conversion" on page 2 of the Exhibit, and under the column "Permanente," what do the [112] headings "Material;" "Labor;" "Overhead;" and "Profit" under the word "Conversion," coupled with the numbers 590,000; 610,000; 401,500 and 60,000 represent?

A. It is a breakdown to the various elements of cost involved in the conversion features.

Q. Is that an estimate, as was the case in Plaintiffs Exhibit AA?

A. That is an estimate prepared by the Technical Division of the Maritime Commission.

Q. Is that a figure per vessel?

A. That is a figure per vessel.

Q. What does the figure \$1,661,500 appearing under the heading "Permanente" opposite the heading "Est. Conversion" represent?

A. It represents the estimated cost of the conversion in total per vessel.

Q. And what is meant by the heading "Est. Base Vessel" appearing under the heading "Conversion"?

A. That is the construction cost of the vessel based on the original design.

Q. Is that a determined cost or is it an estimated cost?

A. It is a determined cost in so far as the con-

(Deposition of John Bassette Maher.)

tract is concerned. All costs are based and bid on an estimated basis. This represents the cost that was fixed in the contract [113] for the construction of the vessels.

Q. What is meant by the term "Base Vessel" as used?

A. That is the vessel as it was originally designed to be built.

Q. That would be without the conversion features?

A. Without the conversion features.

Q. Then would the total estimated cost, as shown by this exhibit, for the base vessel, with the addition of the conversion features, total \$4,601,000 per vessel as indicated by the last heading under the heading "Conversion," that is, "Est. Complete Cost Per Vessel"?

Let me withdraw that and ask it another way.

What is the meaning of the heading "Est. Complete Cost Per Vessel"?

A. That is the cost of a vessel complete with conversion features added.

Q. And how would that total of \$4,601,000 be determined?

A. It is a combination of the original cost of the vessel based on the original design plus the estimated cost of the conversion features.

Q. What are those features, as appear from the exhibit, the figures that give the total?

A. Are you asking me to read the figures?

Q. Yes.

(Deposition of John Bassette Maher.)

A. \$4,601,000 per vessel, including base vessel and cost [113-A] of conversion features.

Q. What I am asking you for is the figures that makes the total of \$4,601,000 per vessel.

A. That figure is broken down into the following:

Estimated cost of conversion, \$1,661,500.

Estimated cost of base vessel, \$2,939,500.

Q. Referring back to Plaintiff's Exhibit AA, and particularly to the figure of \$1,505,000 appearing as a total under the heading "Permanente" does that figure represent an estimated total cost of the vessel or merely an estimate of the total conversion cost?

A. An estimate of the total conversion cost per vessel.

Q. Does Plaintiff's Exhibit AA reflect or show the estimated cost of the base vessel?

A. It does.

Q. Referring again to Plaintiff's Exhibit BB will you explain please the meaning of the long-hand notations on the second sheet with particular reference to any vessels of The Permanente Metals Corporation?

A. The penciled notations appearing on the bottom of the exhibit represent the distribution of the total transfer covered by the public voucher to the various shipyards participating in the vessel construction covered by the Navy Working Fund symbolized as 69X5900.056.

(Deposition of John Bassette Maher.)

Q. What is the meaning of the figure 7 X \$1,661,500 [113-B] equal \$11,630,500?

A. That means in the total group of vessels covered by this particular transfer, seven of them are being built by Permanente Metals Corporation.

The unit cost of each of the seven vessels covering the conversion features only is \$1,661,500, which, multiplied by 7, gives you a total of \$11,630,500.

Q. Then the other notations 4 X \$1,792,000, in the case of California Shipbuilding Corporation; 5 X \$1,555,000 also in the case of California Shipbuilding Corporation; and 4 X \$1,400,000 in the case of Kaiser Co., Inc., are the same type entries as that just described in the case of Permanente?

A. That is correct.

Mr. Walkup: Off the record.

(A discussion off the record was had.)

Q. (By Mr. Walkup): And the total of \$32,173,500 represented by the voucher is the total of the four figures: \$7,168,000; \$7,775,000; \$11,635,000 and \$5,600,000 appearing in the longhand notations?

A. It is.

Q. Is it correct to state, then, that the total sum of \$32,173,500 covers only conversion costs as distinguished from any charges for the base vessel cost?

A. It is correct. [114]

Q. Does the voucher, Plaintiff's Exhibit BB, have the effect of transferring any funds from 69X5900.056 to 69X0200 in so far as base vessel costs are concerned?

A. It does not.

Q. Do the two transfers of funds represented

(Deposition of John Bassette Maher.)

by Plaintiff's Exhibits AA and BB represent the total amount of funds transferred from fund 69X-5900.056 to fund 69X0200, relating to the hulls designated as Permanente Hulls on the two exhibits?

A. With respect to Permanente contract and MC Hulls 552 to 573, inclusive, they do.

Q. Referring to the records which have been previously introduced in your deposition, can you state the total amount paid by the Navy Department toward the conversion and delivery costs of Hulls numbered 552 to 573, inclusive?

A. I can.

Q. Will you do so, please? A. \$34,213,000.

Q. How do you determine that total figure, please?

A. By adding the totals applicable to the Permanente contract on the two vouchers.

Q. What were the two figure which you added?

A. With respect to the voucher dated June 6, 1945, \$22,582,500; and with respect to the voucher dated January 22, 1946, \$11,630,500.

Q. Was the total of \$34,213,000, which you have just [115] given, the total cost to the Maritime Commission of the construction of the vessels known as Maritime Commission Hulls numbers 552 to 573?

A. It was not.

Q. What was the total cost to the Maritime Commission of the vessels numbered 552 to 573?

A. As established by Addendum No. 3 to Contract MCc15762 the total cost was established at \$89,500,000.

(Deposition of John Bassette Maher.)

Q. What accounts for the difference between the sum of \$89,500,000, which you have just given, and the total cost of \$34,213,000, which you previously gave?

A. The construction costs of the vessels based on the original design, which was paid for and absorbed by the Maritime Commission.

Q. Is it correct, then, that the total cost of \$89,500,000, represents the base vessel costs, plus the conversion features of the total value of \$34,213,000?

A. That is correct.

Q. So that the difference between the sum of \$34,213,000 and \$89,500,000, would represent the base vessel cost for hulls numbered 552 to 573?

A. That is correct.

Q. By whom were the base vessel costs paid?

A. By the Maritime Commission.

Q. Has the Maritime Commission been reimbursed by the [116] Navy for the base vessel costs paid by the Commission? A. It has not.

Q. What method was followed in the performance of Contract MCc15762 with reference to the making of payments by the Maritime Commission to the builder, The Permanente Metals Corporation?

A. The builder submits progressively, applications for payment which are entitled to, in addition to the shipyard representative, by the Commission's Resident Auditor.

The applications are supported in detail by the expenditures made to date by the shipbuilder dur-

(Deposition of John Bassette Maher.)

ing the course of the work and show the aggregate of the work to that time, less any payments previously made.

The voucher is paid by the Maritime Commission in the amount of the total payments to date less the payments previously made.

Those payments are made by the Maritime Commission from its Construction Fund symbolized as 69X0200.

Q. I hand you now a document bearing date of December 28, 1943, and request you to please identify that document.

A. That is a document used as the basis for the issuance of a check to a creditor of a federal agency.

Mr. Walkup: Will you kindly mark that for identification as Plaintiff's Exhibit CC?

(Certified photostatic copy of voucher, dated December 28, 1943, to The Permanente Metals Corporation, marked Plaintiff's Exhibit [117] CC for Identification.)

Q. (By Mr. Walkup): Will you please explain how the document, of which this is a copy, referred to as Plaintiff's Exhibit CC, is prepared?

A. The document is prepared in the shipyard. It is certified to by the Resident Auditor as correct and is supported by the shipbuilder's schedule of costs incurred in the prosecution of the contract to that point.

Q. Referring to the public voucher itself, is that document, of which the exhibit is a copy, part of the official records of the Maritime Commission?

(Deposition of John Bassette Maher.)

A. It is.

Q. And is it a document prepared in the regular course of official business of the Maritime Commission?

A. It is.

Q. Will you state please what this public voucher represents?

A. This particular voucher represents the payment of the first application submitted by The Permanente Metals Corporation in connection with work performed to date, in connection with Contract MCc15762.

Q. What is the meaning of the words "Construction Progress Payment No. 1" appearing on the document?

A. Progress Payment applications submitted by the contractor [118] are identified by a numeric designation beginning with 1, and continuing through to the last application submitted in numerical sequence.

Q. I call your attention to the words "69X0200 Construction Fund, U. S. Maritime Commission, Act of June 29, 1936, Revolving Fund," appearing under the heading "Accounting Classification" on the document. Will you please explain the meaning of the symbol as used there and the wording as used there?

A. Under the block entitled "Accounting Classification (For Completion By Administrative Office)," the symbol 69X0200 is used to indicate to the Treasury Department the fund or appropriation from which the disbursement is to be made.

(Deposition of John Bassette Maher.)

Q. Does this voucher then indicate a payment to Permanente by the Maritime Commission of \$3,-123.22, as a first construction progress payment chargeable to fund 69X0200? A. It does.

Mr. Walkup: I offer the document in evidence as Plaintiff's Exhibit CC.

(The voucher heretofore marked Plaintiff's Exhibit CC for Identification was offered in evidence as Plaintiff's Exhibit CC.)

Q. (By Mr. Walkup): Mr. Maher, I hand you now another document bearing date of May 9, 1945. Will you kindly identify that document [119] briefly?

A. That again, is a public voucher used as the basis for the disbursement of funds or the issuance of a check to a creditor of the Maritime Commission for services performed.

Mr. Walkup: May I have that marked for identification as Plaintiff's Exhibit DD?

(Certified photostatic copy of voucher dated May 9, 1945, to The Permanente Metals Corporation was marked Plaintiff's Exhibit DD for Identification.)

Q. (By Mr. Walkup): Is the document of which this is a copy a part of the official records of the United States Maritime Commission?

A. It is.

Q. Is a document of this character prepared in the usual course of official business of the Maritime Commission? A. It is.

(Deposition of John Bassette Maher.)

Q. Will you please state in more detail what this particular voucher represents?

A. This voucher represents the payment of the last application submitted by The Permanente Metals Corporation in connection with the performance of its contract, No. MCc15762 with the Maritime Commission.

Q. What is the number of that construction progress payment? A. No. 420.

Q. Is it correct that there were 420 separate construction [120] progress payments starting with Payment No. 1, as indicated by the previous exhibit, and ending with Payment No. 420 as indicated by this exhibit? A. That is correct.

Q. And were each of the payments made in the same manner, that is, pursuant to a public voucher such as that shown by this exhibit and the preceding exhibit? A. That is correct.

Q. Is the meaning of the accounting classification 69X0200, Construction Fund, U. S. Maritime Commission, Act of June 29, 1936, Revolving Fund, the same on this exhibit as on the immediately preceding exhibit? A. It is.

Q. Were all of the payments made, commencing with Progress Payment No. 1 to and including Progress Payment No. 420 charged to the same fund, that is, 69X0200? A. They were.

Q. What is the amount of the total payment from the Maritime Commission to The Permanente Metals Corporation under Contract MCc15762?

A. Roughly, \$145,000,000.

(Deposition of John Bassette Maher.)

Mr. Pentz: Will you read the question, please?

(Thereupon, the last question was read, as follows:)

“Question: What is the amount of the total payment from the Maritime Commission to The Permanente Metals [121] Corporation under Contract MCc15762?”

The Witness: The aggregate of the progress payments, 1 to 420, as far as I can recall, is roughly \$145,000,000.

Q. (By Mr. Walkup): That would be the total of \$89,000,000, referred to in Addendum No. 3 to Contract 15762 plus the sum of approximately \$56,000,000, which was carried over from Contract 15762 to Contract MCc36452, as testified to by you yesterday afternoon? A. That is correct.

Q. I hand you now a document consisting of four pages entitled “Permanent Report of Completed Ship Construction Contracts, United States Maritime Commission, Construction Division, Washington, D. C.” and ask you please to identify that document.

A. These particular sheets are excerpts from a published report of the Maritime Commission, which reflects the type of vessel under construction, the contract number, the Commission’s hull numbers; the builder’s hull numbers; the original name of the vessel——

Q. Mr. Maher, I will ask you to explain in further detail what the document shows?

(Deposition of John Bassette Maher.)

A. It reflects the status of vessels as of the date of the issue of the report.

Mr. Walkup: May I have that marked for identification as Plaintiff's Exhibit EE? [122]

(Excerpts from published report of Maritime Commission, entitled "Permanent Report of Completed Ship Construction Contracts" marked Plaintiff's Exhibit EE for Identification.)

Q. (By Mr. Walkup): Is the original document, from which these pages are excerpts, an official record of the United States Maritime Commission? A. It is.

Q. Is this record kept by the United States Maritime Commission as part of the regular official business of the Maritime Commission?

A. It is.

Mr. Walkup: I offer this document in evidence as Plaintiff's Exhibit EE.

(The excerpts from published report of Maritime Commission heretofore marked Plaintiff's Exhibit EE for Identification was offered in evidence as Plaintiff's Exhibit EE.)

Q. (By Mr. Walkup): Referring to page 17B, will you state please the meaning of the term "Type" appearing in the first column?

A. The symbols shown there represent the particular type of vessel under construction under the particular contract.

(Deposition of John Bassette Maher.)

Q. What is the meaning of the column headed "Propulsion"? [123] A. Turbine; steam.

Q. That is the method of propulsion of the vessel? A. That is right.

Q. What is the meaning of the heading "Contract Number"?

A. That is the contract number assigned to the contract upon its execution; the identifying number maintained by the Commission throughout the life of the contract.

Q. Does that refer to the contracts between the Maritime Commission and the builder, such as Permanente Metals Corporation? A. It does.

Q. What is the meaning of the heading "MCV Hull No."?

A. That is the identifying symbol of the hull maintained by the Maritime Commission and assigned to that hull by the Maritime Commission.

Q. What is the meaning of the heading "Builder's Hull No."?

A. That is the identifying number assigned to the hull by the builder.

Q. What is the meaning of the column entitled "Original Name"?

A. That is the name of the vessel given to it by the Maritime Commission.

Q. What is the meaning of the heading "Original Operator"? [124]

A. That is the operator who was originally earmarked to receive the vessel for operation.

(Deposition of John Bassette Maher.)

Q. Does that necessarily indicate the present operator? A. Not necessarily.

Q. What is the meaning of the column headed "Builder"?

A. That is the shipbuilder who, under the contract with the Commission, built the vessel.

Q. What is the meaning of the heading "Date of Contract"?

A. That is the date on which the contract was executed between the Commission and the shipbuilder.

Q. What is the meaning of the heading "Delivery date" referring to the heading "Delivery date" under the "Contract Dates"?

A. That is the date on which it was estimated that the vessel would be delivered.

Q. In other words, this heading "Delivery date" which appears under the superimposed heading "Contract Dates" refers to the delivery date as set forth in the contract? A. That is correct.

Q. That is not necessarily the actual delivery date? A. No, sir.

Q. Referring then to the heading "Actual Construction Dates" and to the three headings under that column entitled "Keel Laid;" "Launched;" and "Delivered," will you state please the meaning of those headings? [125]

A. Those headings cover the actual technical activities performed in the shipyard, beginning with the keel laying and carrying on through the various operations.

(Deposition of John Bassette Maher.)

I would rather not go into any detail on that.

Q. Do you know if the heading "Keel laid" designates the date that the keel of each vessel indicated in the list was actually laid?

A. Not of my own knowledge.

Q. I don't mean by that were you actually present at the laying of each keel, but I mean as the document appears do you know whether or not that column signifies the date of keel laying merely to identify the various columns appearing on the document?

A. The heading of the columns would signify that.

Q. And would the same be true as to the heading of the column designated "Launched"?

A. That would be the implication given by the heading of the column.

Q. And also the heading "Delivered"?

A. I can answer that question because we have certificates of delivery. That is the date on which the vessel was delivered by the shipbuilder and accepted by the Maritime Commission.

Q. You mentioned delivery certificates; what do you mean by that? [126]

A. At the time the completed vessel is delivered and accepted by the Maritime Commission from the shipbuilder a certificate is prepared in multiple copies which recites the date, the time, the name of the vessel, and other data pertinent to the transaction, copies of which are distributed to the various parties concerned, of which our office is one.

(Deposition of John Bassette Maher.)

Q. So that the column entitled "Delivered" under the superimposed heading "Actual Construction Dates" refers to the actual date of delivery of the vessel from the shipbuilder to the Maritime Commission, as shown on the official delivery certificates? A. That is correct.

Q. Referring now to page 18B and also to page 19B, where the headings of the columns are slightly different from the headings on page 17B, the first difference in headings of the columns appears to be that one column is designated as "Name," on pages 18B and 19B, and as "Original Name" on page 17B. What is the meaning of the heading "Name" which appears on pages 18B and 19B?

A. As far as my experience is concerned there is no difference. I do not know why it is stated differently in the report.

Q. And likewise on pages 18B and 19B one column is headed "Operator" whereas on page 17B that column is headed "Original Operator." What is the meaning of the heading [127] "Operator" appearing on page 18B?

A. I don't know why it should be stated differently. The effect is the same, in that the operator originally designed to receive the vessel is usually noted in that column.

Q. Then would it be correct to state that the column headed "Operator" on pages 18B and 19B designates the original operator rather than the present operator of the vessels?

A. That is correct.

(Deposition of John Bassette Maher.)

Q. There is one additional column appearing on pages 18B and 19B which did not appear on page 17B, and that is the heading "Percentage of Completion Total." What is the meaning of that column?

A. The progress report published periodically reflects the percentage of completion of the given vessel as of the date of the report.

Q. Other than the headings specifically mentioned on pages 18B and 19B would your designation of those column headings be the same as you have testified for page 17B? A. That is right.

Mr. Walkup: At this time I would like to renew my offer of all of the exhibits which have been marked for identification in this deposition, with the understanding that the offer is made separately as to each of the exhibits identified, to cover the contingency that I may have neglected to offer each document separately during the examination of the witness. [128]

(All exhibits marked for identification as Plaintiff's Exhibits in this deposition were offered in evidence as Plaintiff's Exhibits so marked.)

Mr. Walkup: That is all on direct.

Mr. Pentz: Off the record.

(A discussion off the record was had.)

The Notary Public: At 11:45 o'clock a.m. this hearing is adjourned until 1:30 o'clock p.m. at the same place.

(Thereupon, at 11:45 o'clock a.m. an adjournment of the depositions was taken to 1:30 o'clock p.m. October 2, 1947.)

(Thereafter, at 1:30 o'clock p.m., on October 2, 1947, the further taking of the depositions was resumed.)

JOHN BASSETTE MAHER

a witness produced on behalf of the Plaintiff and Cross-Defendant, The Permanente Metals Corporation, having been previously sworn, testified further on his oath, as follows:

Cross-Examination

By Mr. Pentz:

Q. Mr. Maher, I direct your attention to Plaintiff's Exhibit EE, and more particularly to page 17B, and specifically to the column entitled "Date of Contract," which is below the superimposed words "Contract Dates," and ask you whether or not the dates which appear in that designated vertical column [129] indicates the date when the contracts were signed, or whether it indicates the date which the contracts bear, if you know?

A. It indicates the date on which the contract was entered into between the parties to the contract.

Q. What do you base your statement on as to when the contract is entered into?

A. Speaking as a layman, on the preamble to the language of the contract itself—the contract entered into on such and such date between so-and-so and so-and-so.

(Deposition of John Bassette Maher.)

Q. In other words you are referring to the date which appears on the face of the contract?

A. In the language of the contract, as opposed to any date that may be at the top of the contract.

Q. Am I correct in assuming that you refer to a date which in one form or another is specifically set forth in the body of the contract?

A. That is correct.

Q. The answer would be the same, would it, with regard to a like question propounded to you with regard to the dates appearing vertically below the heading "Date of Contract," under the superimposed words "Contract Dates," as they appear on page number 18B? A. That is correct.

Q. And likewise your testimony would be identical if the same question were propounded to you with regard to the [130] dates appearing in the vertical line under the heading "Date of Contract," under the superimposed words "Contract Dates" appearing on page number 19B?

A. That is correct.

Q. I take it, Mr. Maher, that the original of the document, of which Plaintiff's Exhibit EE is a copy, is an official document of the United States Maritime Commission? A. That is correct.

Q. Is it or is it not true that the original of which I speak, in so far as you know, contains accurate information?

A. I can answer that in this manner: The information reflected by the documents is relied on by

(Deposition of John Bassette Maher.)

our organization. By "our organization" I refer to my specific department in the development and preparation of statements.

Q. May I ask you whether or not you have any information to the effect that the entries contained in Plaintiff's Exhibit EE are not true and accurate reflections of the facts which they purport to state?

A. I have no such information.

Q. Drawing your attention on page number 17B, of Plaintiff's Exhibit EE, under the words "Actual Construction Dates," more particularly the column entitled "Keel Laid," I direct your attention to the dates which appear vertically below: Do you have any knowledge or information that the entries therein contained are not true and accurate?

A. I do not. [131]

Q. Directing your attention to the word "Launched," also appearing under the superimposed words "Actual Construction Dates," and more particularly the dates appearing in the vertical line thereunder, do you have any information or knowledge that the entries therein contained are not true and accurate?

A. Confining my answer to the vertical column captioned "Launched," I do not.

Q. Would your testimony be the same if the identical question was propounded to you with regard to the column entitled "Keel Laid," under the superimposed words "Actual Construction Dates," appearing on page number 18B?

The Witness: Will you read the question?

(Deposition of John Bassette Maher.)

(Pending question read by the reporter.)

The Witness: Yes, sir.

Q. (By Mr. Pentz): Would your testimony be the same if the identical question were propounded to you with regard to the dates appearing vertically below the word "Launched," in turn appearing under the superimposed words "Actual Construction Dates," on page number 19B?

A. Yes, sir.

Q. Mr. Maher, I direct your attention to Plaintiff's Exhibit AA, more particularly to the schedule attached thereto, starting with the words "Engineering Estimates of Conversion [132] Costs," et cetera. I believe—and correct me if I am mistaken—that your testimony was that the figure \$1,505,500 appearing under the heading "Permanente" represents the estimated costs of conversion features of the vessels whose Maritime designation numbers appear immediately below the word "Permanente."

A. That is correct with respect to an estimate per vessel.

Q. And that therefore the figure \$22,582,500 appearing below and opposite the words "Total Conversion Cost (By Yards)" represents the estimated cost of the conversion features of the vessels enumerated by Maritime Commission numbers immediately beneath the word "Permanente," that that \$22,582,500 represents the total estimated cost of conversion features for the entire 15 vessels.

A. That is correct.

Q. As I understood your testimony, that repre-

(Deposition of John Bassette Maher.)

sented a sum which was originally advanced by the United States Maritime Commission by withdrawal from its "Construction Fund, United States Maritime Commission, Act of June 29, 1936, Revolving Fund" known by the Maritime Commission symbols 69X0200.

A. The \$22,582,500 represents direct disbursements from the Maritime Commission Construction Fund to The Permanente Metals Corporation upon application and in connection with payments due under that contract. [133]

Q. What, if anything, was done, if you know, with regard to the payment into your United States Maritime Commission Working Fund known by Maritime Commission symbol 69X5900.056 by any other government agency than the United States Maritime Commission of the sum of \$22,582,500?

The Witness: May I have the question read?

(Pending question read by the reporter.)

A. After it was deposited into the Construction Fund, United States Maritime Commission, Act of June 29, 1936, Revolving Fund, symbolized as 69X0200, nothing was done specifically with the \$22,582,500 beyond the fact that it became a part of funds available for use by the Maritime Commission itself for construction work.

Q. I haven't made myself clear, Mr. Maher. Isn't it a fact that in one form or another the United States Navy paid the United States Maritime Commission the sum of \$22,582,500?

(Deposition of John Bassette Maher.)

A. That is correct.

Q. To take care of the estimated costs of the conversion features of vessels known by Maritime Hulls 552 through 556, 558, 560, 562, 564, 567, 569, 571 through 573 and 565?

A. The Navy Department did reimburse the Maritime Commission to the extent of the money just mentioned by you and covering the hulls just mentioned by you.

Q. And am I correct in this: That the sum of \$22,582,500 was paid by the United States Navy to the United [134] States Maritime Commission, the latter in turn placing that on deposit in its United States Maritime Commission Working Fund, known by the symbol 69X5900.056?

A. No, sir. This document represents a request by the Maritime Commission for a transfer of funds from the Working Fund 69X5900.056 which had been previously made available for the use of the Maritime Commission by the Navy Department in a sum of money which included the \$22,582,500.

The actual transfer of \$22,582,500 represented a disbursement from 69X5900.056 and a deposit into 69X0200.

Q. Therefore, this \$22,582,500 does represent money secured from funds originally made available by the United States Navy to the United States Maritime Commission? A. That is correct.

Q. I direct your attention to Plaintiff's Exhibit BB, more particularly to the enclosure attached thereto dated October 12, 1945. Under the heading

(Deposition of John Bassette Maher.)

that appears thereon "Permanente" I understood your testimony to be that the estimated cost for the conversion features of the vessels identified by United States Maritime Commission Hull numbers 557, 559, 561, 563, 566, 568 and 570 was a sum of money in connection with each of said vessels in the amount of \$4,601,000.

The Witness: Will you repeat the question, please?

(Pending question read by the reporter.)

Mr. Walkup: I object to the form of the question as to [135] what Mr. Pentz understood the witness' testimony to be. That is calling for a conclusion and opinion of the witness.

Mr. Pentz: Very well. I will reframe the question.

Q. (By Mr. Pentz): I direct your attention to the figure \$4,601,000 which appears at the bottom of the column entitled "Permanente," and ask you to state what that figure signifies.

A. That figure represents the total construction cost of the vessel at completion, including the conversion features stated in various elements of cost, and in an amount of \$1,661,500.

Q. So that the figure \$1,661,500 appearing in the same column opposite the words "Est. Conversion" is the estimated cost per vessel of the conversion costs of the vessels whose Maritime Commission numbers appear under the words "Richmond No. 3"?
A. Yes, sir.

(Deposition of John Bassette Maher.)

Q. What is the significance of the figure \$11,630,500 appearing in pencil notation in the third from the top horizontal line of pencil notations located on the bottom of the schedule attached to Plaintiff's Exhibit BB?

A. That represents the total cost of the conversion features of the 7 vessels whose Maritime Commission hull numbers are listed under the vertical column captioned "Richmond No. 3." [136]

Q. Now, I ask you whether or not the Maritime Commission received from the United States Navy the sum of \$11,630,500 as reimbursement for the cost of the conversion features of the vessels known by the Maritime Commission numbers appearing below the words "Richmond No. 3," on that schedule?

A. The Maritime Commission did receive from the Navy Department a sum of money which included the \$11,630,500 in an original working fund.

The Maritime Commission was later reimbursed to the extent of the \$11,630,500 through a transfer of funds from Working Fund symbol 69X5900.056 to appropriation symbol 69X0200 through the medium of the voucher attached to Plaintiff's Exhibit BB.

Q. And the reimbursement you have referred to in your last answer was a reimbursement from the United States Navy?

A. It was a reimbursement from a working fund made available to the Commission by the United States Navy.

(Deposition of John Bassette Maher.)

Mr. Pentz: Off the record.

(A discussion off the record was had.)

Q. By Mr. Pentz): Mr. Maher, I believe you testified that the grand total of the estimated conversion costs for vessels known by the Maritime Commission numbers 552 through 573 inclusive was approximately \$34,213,000; is that correct?

A. That is correct. [137]

Q. Is it or is it not a fact that in one form or another the United States Navy reimbursed the United States Maritime Commission for that \$34,213,000?

A. That is correct.

Q. Directing your attention to Plaintiff's Exhibit AA and to the schedule appearing attached thereto, and more particularly to the figure \$22,582,500 appearing at the bottom of the column marked "Permanente," will you tell me, if you please, how you arrived at that figure?

A. In the sense of the words "arrived at the figure," I did not arrive at it. The figure was furnished the Accounting Division by the Technical Division, upon the request of the Budget Officer and the Accounting Division, to the Technical Division for the information.

Q. Now, Mr. Maher, when in giving your last answer you referred to the Accounting Division you have reference, I take it, to the Accounting Division of the United States Maritime Commission?

A. I do.

Q. And when in that answer you referred to the

(Deposition of John Bassette Maher.)

Technical Division is it true that you had reference to the Technical Division of the United States Maritime Commission? A. I do.

Q. And when you referred in that answer to the Budget Officer is it correct that you were referring to the Budget [138] Officer of the United States Maritime Commission?

A. I was, sir. May we go off the record a moment?

Mr. Pentz: Yes.

(A discussion was had off the record.)

Q. (By Mr. Pentz): I direct your attention, Mr. Maher, to the figure \$22,582,500 appearing beneath the word "Permanente," and opposite the words "Total Conversion Cost," appearing on the schedule attached to Plaintiff's Exhibit AA, and ask you whether or not you have in your custody any records or documents which would indicate how that total was arrived at? A. I do not.

Q. Is there any other department or division of the United States Maritime Commission where you believe there may exist any papers or documents bearing upon how the total of \$22,582,500, that I referred to in my previous question, was arrived at?

A. Of my own knowledge I have never seen any such records.

Mr. Pentz: Will you repeat the question and I will ask the witness to answer it.

(Pending question was read by the reporter.)

(Deposition of John Bassette Maher.)

The Witness: I answered that to the effect that of my own knowledge I don't know. I have never seen any such records. [139]

Q. (By Mr. Pentz): I have not asked you to tell me what you know or don't know. The purport of my question is, is there any other department of the United States Maritime Commission where you believe there may exist any records bearing upon how the total of \$22,582,500 was arrived at?

A. I can still only state that any figure or any total must presumably have a breakdown. I don't know; I cannot say.

Q. Where is your best estimate of where that breakdown exists?

A. The total is furnished us by the Technical Division.

Q. Am I to understand the Technical Division of the United States Maritime Commission is your best estimate as to where such documents might be found?

A. If they were in existence, I would say yes.

Mr. Pentz: Will you read the question?

(Pending question read by the reporter.)

Mr. Walkup: He has answered it, hasn't he?

Mr. Pentz: No, he hasn't.

The Witness: What did I say?

(Thereupon, the last answer was read, as above recorded.)

Q. (By Mr. Pentz): In so far as your knowledge goes, such records may [140] exist in the Tech-

(Deposition of John Bassette Maher.)

nical Division of the United States Maritime Commission? A. Yes.

Q. Can you furnish me with any other division of the United States Maritime Commission where you feel that such records might exist?

A. No, sir.

Q. Will you investigate and determine whether or not any such records do exist in the Technical Division of the United States Maritime Commission?

Mr. Walkup: I object to that. I think that is going a little too far to request this witness to undertake a personal investigation of the records of another division of the Commission.

Mr. Pentz: You may answer it, subject to Mr. Walkup's objection.

Mr. Walkup: I object to the question, although objections are reserved until the time of trial.

Mr. Maher has important duties to perform in his own department. His superiors have contacted me requesting that he be released from these proceedings to get back to his routine duties as soon as possible.

Mr. Pentz: You may answer the question subject to Mr. Walkup's objection. [141]

A. I cannot undertake an investigation of the records of another division unless I am directed to do so by the Director of my own division.

Q. (By Mr. Pentz): And what is his name?

A. Mr. Frank L. Lynch.

(Deposition of John Bassette Maher.)

Q. And his formal title in the United States Maritime Commission is what?

A. Chief, Accounting Division, Bureau of Accounts, United States Maritime Commission.

Mr. Pentz: Mr. Walkup, will you personally assist me in endeavoring to ascertain from the Technical Division of the United States Maritime Commission whether or not that division possesses any papers or records bearing upon how the figure \$22,582,500 appearing under the heading "Permanente" and opposite the words "Total Conversion Cost," as contained in the schedule attached to Plaintiff's Exhibit AA was arrived at?

Mr. Walkup: I am not certain that any such records exist, and within the limits of the time available to me I will make an effort to determine what is available in that regard.

Mr. Pentz: Off the record.

(A discussion off the record was had.)

Q. (By Mr. Pentz): State, if you will please, Mr. Maher, whether or [142] not your division ever kept any copies of the letters or correspondence or reports, whatever they were, upon which was based the figure \$22,582,500 which appears on the schedule attached to Plaintiff's Exhibit AA?

A. Beyond an exchange of memoranda originally requesting the information, and the reply in the form of the schedule which you have now questioned me about, our division did not maintain nor did they ever have any such records to maintain.

Q. Did you ever see any such records?

(Deposition of John Bassette Maher.)

A. Comprising the detail of the twenty-two million?

Q. That is correct. A. No, sir.

Q. Did you ever see a memorandum which contained the information derived from the records we are speaking about upon which you based the figure \$22,582,500?

A. I have never seen any breakdown beyond the general category of elements of cost as reflected in that schedule.

Q. Then who did actually prepare these figures?

A. The memorandum requesting the figures, as I have previously testified, was directed to the Director of the Technical Division. His reply simply gave us the breakdown with respect to general categories of expense, labor, material, overhead, profit, et cetera, aggregating the twenty-two million dollars. There were no figures presented to us which showed a [143] further breakdown within the general category.

Q. Now, Mr. Maher, I direct your attention to Plaintiff's Exhibit BB——

Mr. Walkup: I suggest this, that we still have some testimony to obtain from the Assistant Secretary. His deposition was continued for the production of some further information this morning. If that information is available now I suggest we adjourn this deposition and complete the Assistant Secretary's Deposition.

Then I will be in touch with the Technical Division this afternoon on some other matters, and I

(Deposition of John Bassette Maher.)

will see if this particular information is readily available.

Mr. Pentz: That is agreeable with me, and I therefore suggest that Mr. Labofish adjourn us to reconvene at 11 o'clock in the morning to complete the taking of Mr. Maher's deposition.

(Thereupon, at 3 o'clock p.m. the Notary Public adjourned the further taking of this deposition until 11 o'clock a.m., Friday, October 3, 1947.)

Friday, October 3, 1947

(The further taking of the deposition of the witness John Bassette Maher was resumed at 11 o'clock a.m., the parties present being Bruce Walkup, Attorney on behalf of the Plaintiff and Cross-Defendant, The Permanente [144] Metals Corporation, a corporation; Mr. Elliott H. Pentz, Attorney on behalf of the Defendants and Cross-Complainants, John Urquhart Birnie, an individual doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company; The Notary Public, John O. Labofish; the Reporter, Mrs. Chloe S. MacReynolds; and the witness, John Bassette Maher.)

JOHN BASSETTE MAHER

a witness produced on behalf of the Plaintiff and Cross-Defendant, The Permanente Metals Corpora-

(Deposition of John Bassette Maher.)

tion, a corporation, having been previously sworn to state the truth, the whole truth, and nothing but the truth, testified further on his oath as follows:

The Notary Public: Mr. Maher, you are reminded that you are still under oath.

The Witness: Yes, sir.

Mr. Pentz: Let the record show that the taking of the deposition was reconvened and that I have no further questions at this time of Mr. Maher.

Redirect Examination

By Mr. Walkup:

Q. Mr. Maher, yesterday afternoon you testified from the Maritime Commission's Completed Vessels report, and specifically from certain pages excerpted from that report designated as Plaintiff's Exhibit EE, and you testified in response [145] to questions by Mr. Pentz, concerning pages 17B, 18B and 19B of that report.

I ask you now with further reference to those documents if the name appearing under the column "Name" on each of the pages was necessarily known at the time that the contract was entered into; that is, the date of contract appears as 4-22-43 on page 18B, referring to Contract 15762; is it necessarily a fact that the names appearing under the "Name" column and the name of the operator appearing under the column "Operator" were known at that time?

A. Not necessarily, and in all probability they were not.

(Deposition of John Bassette Maher.)

Q. Is it not true that page 17B shows completed contracts? A. That is true.

Q. And by that is meant the status as reflected at the time the vessels referred to on that page had been completed?

A. At the time the report was published each vessel reflected on that page had been completed.

Q. Referring to page 18B, and particularly to the column entitled "Percentage of Completion Total," what is the significance of the item 100?

A. The item 100 is a percentage figure indicating the vessels at the time of the issuance of that report were 100 per cent complete with respect to Maritime Commission's [146] specifications.

Q. And would that be true of the same column on page 19B, the percentage of completion total and the designation 100 thereunder?

A. That is the same situation.

Q. Was it the custom of the Commission to have periodic progress reports during the course of construction showing the percentage of completion at various dates?

A. It was, and is currently customary.

Q. I hand you herewith a sheet, which is a photostatic copy of two pages bearing the heading "Report No. 72," sheet 1 being labeled as "Sheet No. 89," and sheet 2 being labeled as "Sheet No. 90." Would you please identify those two sheets?

A. This is an excerpt from a regularly published report of the Maritime Commission which is published on a monthly basis, and it shows by contract,

(Deposition of John Bassette Maher.)

hull number, and shipbuilder, and type of vessel, all of the vessels under contract as of the date of the publication of the specific report.

It shows the total percentage of completion as at the date of publication and the gain for the month elapsing between the current and the prior publication.

Mr. Walkup: Mr. Pentz, referring to our conversation this morning with reference to this document, am I correct in stating that you have agreed you will make no objection to this document on the ground that it is not a certified copy [147] of an original record?

Mr. Pentz: Off the record.

(A discussion off the record was had.)

Mr. Pentz: That is true; I will make no such objection.

Mr. Walkup: May I have this document, consisting of two sheets, marked for identification as Plaintiff's Exhibit GG?

(Photostatic copy (two sheets) entitled "Report No. 72, Sheets No. 89 and 90," was marked Plaintiff's Exhibit GG for Identification.)

Q. (By Mr. Walkup): Is the document, of which the exhibit is a copy, an official record of the Maritime Commission? A. It is.

Mr. Walkup: I have ascertained from the office where this was obtained, Mr. Pentz, that the date of the report, of which this is an excerpt, is Janu-

(Deposition of John Bassette Maher.)

ary 1, 1944, and subject to your right to check that and correct that information, if it is wrong, are you willing to stipulate that it is from Report No. 72 of date January 1, 1944?

Mr. Pentz: I so stipulate.

Q. (By Mr. Walkup): Can you by referring to this progress report, No. 72, illustrate your explanation of the fact that the name appearing on pages 17B, 18B and 19B of Plaintiff's Exhibit EE, under the column headed "Name" does not necessarily indicate [148] that the name had been assigned on the contract date, as shown in the column for "Contract Date" on pages 17B, 18B and 19B?

A. No names had been assigned at the date of the issuance of this report.

Q. Referring to Report No. 72?

A. Referring to Report No. 72, dated January 1, 1944.

Mr. Walkup: I offer this document now marked as Plaintiff's Exhibit GG for Identification, consisting of two pages, in evidence as Plaintiff's Exhibit GG.

(The document heretofore marked Plaintiff's Exhibit GG for Identification was offered in evidence as Plaintiff's Exhibit GG.)

Mr. Walkup: I have no further questions on redirect examination.

Mr. Pentz: I have some questions.

(Deposition of John Bassette Maher.)

Recross-Examination

By Mr. Pentz:

Q. Directing your attention to page 18B of Plaintiff's Exhibit EE, and to the vertical column entitled "Name," and directing your attention to the list of names starting with the name "Sarasota" and continuing through and including the name "Bingham," do you or do you not have any actual, personal knowledge as to when those names were assigned to the vessels? A. I do not.

Q. Actually those names were assigned to those vessels by the United States Navy. Is that not true? [149]

A. I cannot answer the question.

Q. Do you know who assigned those names to those vessels?

A. Mr. Pentz, the reason I said I cannot answer the question, names were assigned to the vessels by the Maritime Commission. The agreement with the Navy Department vested the right in the Navy to change the name to one of its own selection.

There are records in the Maritime Commission which will show the former and the new name. I am not prepared to state which one this name is.

Q. In so far as this record goes, namely, page 18B of Plaintiff's Exhibit EE, can it or can it not be ascertained when those names were assigned to those vessels? A. It can be ascertained.

Q. In what manner, please?

Mr. Walkup: Off the record.

(Deposition of John Bassette Maher.)

(A discussion off the record was had.)

The Witness: Will you read the question?

(The pending question was read by the reporter.)

The Witness: It can be ascertained.

Q. (By Mr. Pentz): Please explain to me how from this record you can ascertain that?

A. From this record, this particular exhibit, it cannot [150] be ascertained.

Mr. Walkup: Then your answer to his previous question should be that it cannot——

Mr. Pentz: Just a minute; he is doing the testifying, Mr. Walkup. You are acting as his attorney and not as the witness.

Mr. Walkup: I am not acting as his attorney.

Mr. Pentz: You are at least not the witness.

Mr. Walkup: That is correct.

Mr. Pentz: Very well. I will ask you not to testify for him.

Mr. Walkup: I did not intend to testify.

Q. (By Mr. Pentz): Let's get one thing clear: Am I correct in understading that you cannot from this record, namely page 18B of Plaintiff's Exhibit EE, determine when the names were assigned to those vessels?

Mr. Walkup: Off the record.

(A discussion off the record was had.)

Mr. Walkup: Will you read the question, please?

(Deposition of John Bassette Maher.)

(Thereupon, the question was read, as follows:)

“Question: Please explain to me how from this record you can ascertain that?”

The Witness: Considering this record as the specific exhibit, you cannot. [151]

Q. (By Mr. Pentz): Now, I direct your attention to Plaintiff's Exhibit GG, and ask you whether or not you are able by the examination of that record to determine when the names appearing on page No. 18B in Plaintiff's Exhibit EE, starting with the name “Sarasota” and continuing through and including the name “Bingham” were assigned to the vessels?

The Witness: Will you read the question, please?

(The pending question was read by the reporter.)

The Witness: No, sir.

Mr. Pentz: No further questions.

Mr. Walkup: No further questions. May the record show the Notary Public excuses the witness from any further testimony?

The Notary Public: Have both of you gentlemen concluded?

Mr. Pentz: Yes, sir.

Mr. Walkup: Yes, sir.

Mr. Pentz: One last thing: Did I ask you whether or not the deposits in those funds were deposited in the United States Treasury?

(Deposition of John Bassette Maher.)

The Witness: I do not believe you asked me that question specifically.

Mr. Pentz: Then I do want to ask that question.

Q. (By Mr. Pentz): Referring your attention to Construction Fund, U. S. [152] Maritime Commission, Act of June 29, 1936, Revolving Fund, known by the United States Maritime Commission designation 69X0200, is it not a fact that moneys deposited in that account are actually deposited in the United States Treasury? A. That is correct.

Q. Is that likewise true with regard to the account known as United States Maritime Commission Working Fund identified by United States Maritime Commission symbol 69X5900.056?

A. That is correct.

Mr. Pentz: No further questions.

Mr. Walkup: May the record show that the Notary excuses Mr. Maher from further testimony, his examination having been completed, and will the Notary please continue the deposition until 2 o'clock this afternoon for another witness, being one of the witnesses designated by the Chairman of the Maritime Commission to testify on his behalf?

The Notary Public: Very well; it is so ordered. This witness is excused sine die.

This hearing will resume at 2 o'clock p.m., at which time another witness will testify.

Mr. Walkup: Before we adjourn, Mr. Notary, I would like to state for the record yesterday afternoon and this morning I have made a serious and sincere effort to locate certain records requested by

Mr. Pentz yesterday, and which he asked me if I would undertake to cooperate with him to produce and [153] that the results of my search have been that such records if they exist at all are in storage in Maritime Commission warehouses, and if they can be located with the presently existing manpower shortages in the Commission, the location may consume some three or four days to two or three weeks, and that I have reported this information back at this time.

Mr. Pentz: May the record also show that the time consumed in having progressed this far is approximately two weeks; that business matters not only of my own but those of Mr. Walkup are such that we feel in the circumstances we will not pursue the matter further.

Mr. Walkup: I would like to correct that statement only to this extent: The decision is up to you as to whether or not you desire to pursue the matter further, Mr. Pentz. The documents were not requested by me in the first place, and I merely offered my assistance in attempting to comply with your request, that I cooperate to see if they were readily available.

Mr. Pentz: Very well.

(Thereupon, at 11:45 o'clock a.m., the further taking of the depositions was adjourned to reconvene in Room 4705, Department of Commerce, at 2 o'clock p.m., on October 3, 1947.)

/s/ JOHN BASSETTE MAHER.

District of Columbia,
City of Washington—ss.

I, John P. Labofish, a Notary Public within and for the District of Columbia, do hereby certify:

That prior to being examined the witness whose signature is affixed to the foregoing deposition was sworn by me to testify the truth, the whole truth and nothing but the truth;

That said deposition was taken down by Chloe S. MacReynolds, an official court reporter of the District Court of the United States for the District of Columbia, in shorthand, at the time and place therein stated and was thereafter reduced to typewriting under her direction;

That Chloe S. MacReynolds, the Reporter, is a disinterested party to the cause;

That when reduced to typewriting the deposition was read by or to the said witness, who was duly informed by me of the right to make such corrections as might be necessary to render the same true and correct, and the same was thereupon signed by the said witness in my presence.

I further certify that I am not of counsel or attorney for either of the parties hereto or in any way interested in the event of this cause, and that I am not related to either of the parties thereto.

Witness my hand and seal this 6th day of November, 1947.

[Seal] /s/ JOHN P. LABOFISH,

Notary Public Within and for
the District of Columbia.

My commission expires Dec. 14, 1947. [154-A]

[Title of District Court and Cause.]

DEPOSITION OF IVAN JOYCE WANLESS

Appearances:

BRUCE WALKUP,

On behalf of Bruce Walkup; Willis S. Slusser; Thelen, Marrin, Johnson & Bridges, Attorneys for Plaintiff and Cross-Defendant, The Permanente Metals Corporation, a corporation. [155]

ELLIOTT H. PENTZ,

On behalf of Hill, Morgan & Farrer; Tinning & DeLap; Mellin and Hanscom, Attorneys for Defendants and Cross-Complainants, John Urquhart Birnie, an individual doing business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, a corporation.

Deposition of Ivan Joyce Wanless, taken on behalf of the plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation. in Room 4809 Department of Commerce, in Washington, D. C., at 2:00 o'clock p.m., on the 3rd day of October, 1947, before John P. Labofish, a Notary Public within and for the District of Columbia, pursuant to the annexed stipulation.

(The further taking of the depositions was resumed on October 3, 1947, at 2:00 o'clock p.m., pursuant to the adjournment taken.)

IVAN JOYCE WANLESS

a witness produced on behalf of the plaintiff and cross-defendant, The Permanente Metals Corporation, a corporation, being first duly sworn to state the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

Direct Examination

By Mr. Walkup:

Q. Will you state your name?

A. Ivan Joyce Wanless.

Q. Where do you reside? [156]

A. 15 Poe Road, Bethesda, Maryland.

Q. By whom are you employed?

A. United States Maritime Commission.

Q. In what capacity?

A. Chief of the Preliminary Design Branch of the Technical Bureau.

Q. How long have you been employed by the United States Maritime Commission?

A. Since March 13, 1938.

Q. Are you a graduate of any university?

A. University of Michigan with the degree of Bachelor of Science; Naval Architect and Marine Engineering.

Q. In what year? A. 1930.

Q. Since graduation and the obtaining of the degree just mentioned have you had any practical experience in connection with ship design?

A. Yes, both before and after graduation.

Q. To what extent, please?

(Testimony of Ivan Joyce Wanless.)

A. Since graduation I have been continuously employed in the design departments of the New York Shipbuilding Corporation from August 1, 1930, roughly, to July 1, 1935; as an assistant in the Preliminary Design Section of the United States Navy from July 1, 1935, to the date of March 13, 1938.

Q. Since being with the United States Maritime Commission what position have you held? [157]

A. I came over here as an assistant in the then Hull Section; started immediately on design work as an assistant; then was given charge of design directly under the Director of the then Technical Division, reporting to the Commission directly as desired, until my present branch was organized.

Q. Are you the author of any publications relating to ship design?

A. May I just clarify that question? You mean text books or things of that nature, or do you mean technical papers?

Q. Technical papers or other articles relating to ship design which have been published?

A. I have written a number, and I presented two papers in collaboration with Mr. Bates to the Society of Naval Architects, Marine Engineers, one being entitled "Subdivision of Maritime Commission Vessels," and the other entitled "Aspects of Large Passenger Vessel Design."

Q. Are you a licensed naval architect?

A. Being a Government employee I do not hold

(Testimony of Ivan Joyce Wanless.)

an engineer's license but I am qualified to obtain the same any time I wish.

Q. Will you state, please, the duties of your position as you have testified you hold at the present time?

A. I am basically in charge of the planning of the Maritime Commission's programs for construction; of determining [158] the characteristics of the vessels required for the various trade routes or services required by the American shipping industry, interpreting those characteristics into specific designs as to length, beam, draft, cargo capacity and other features which are a prerequisite for the final development of the design to permit building and construction.

Mr. Pentz: May I have the answer read back, please?

(Thereupon, the answer of the witness was read as follows:

"I am basically in charge of the planning of the Maritime Commission's programs for construction, of determining the characteristics of the vessels for the various trade routes or services required by the American shipping industry, interpreting those characteristics into specific designs as to length, beam, draft, cargo capacity and other features which are a prerequisite for the final development of the design to permit building and construction.")

Q. (By Mr. Walkup): Do your duties include

(Testimony of Ivan Joyce Wanless.)

any function with reference to the designation of Maritime Commission vessels by numerical or letter symbols? A. Yes, they do.

Q. To what extent? [159]

A. We originate all designations. May I just, to simplify it, make a statement off the record?

Mr. Walkup: I think it is better if we stay on the record. I think our delays up to now have been because we have gone off the record.

The Witness: May I put it this way? In preparing a design we give it in my own branch a designation, which is only for filing purposes within our own group because all work originates there and is of interest to nobody else until we are ready for it to go outside.

As soon as a design appears as though it is going to be utilized we then give it a design number, or letter, rather, with a prefixing symbol as to the type, such as cargo, passenger, coastwise or tanker, and in between is inserted the letter "X" meaning the thing is still in the experimental stage.

Then when the design becomes crystallized and we know definitely the type of propulsion, and the length, and so forth, the final designation is given which would take the form of, like the bids just opened today, C3, S1, DN1.

Q. Do the designations such as you have given by way of illustration officially originate in your section? A. Yes, sir.

Q. And during the past several years have you

(Testimony of Ivan Joyce Wanless.)

been in charge of the work of making and giving such designations? [160]

A. We wrote up the original memorandum which was approved by the Commission as its official designation and have had charge of assigning such designations ever since.

Q. Does your work in your official capacity include the actual designing of vessels for the Maritime Commission? A. Yes, sir.

Q. Have you personally participated in the designing of a number of the Maritime Commission vessels now in use?

A. All of them, including the original C2's.

Q. As to what vessels have you personally participated in the design?

A. I believe there are approximately about 140 different types that have been designed. Many have been constructed of each type, and many of many of the types, in all together around 5,000-some ships are involved.

Q. That is with all the various ramifications and changes.

A. Yes, sir. And through our specific Design Section I believe we have at least 140 designs that have originated and been carried through by myself and my staff.

Q. Do you have any knowledge from personal participation in the design of the AP class of vessel for the Commission? A. The Victory ship?

Q. Yes. A. Yes. [161]

Q. To what extent? A. Complete.

(Testimony of Ivan Joyce Wanless.)

Q. What was your first connection with the AP series of vessels?

A. In the summer of 1942 when submarine losses were still running fairly high, it became apparent that it might be advisable to consider entering into construction of a higher speed vessel to overcome the submarine menace.

To go back to the beginning, in 1939-1940 when the British construction was started here and then the President initiated the Liberty Ship program which was basically an extension of the British ship program, it was evident the machine capacity of the country was not capable of producing geared turbine machinery in sufficient quantity. For that reason the Liberty ship with reciprocating engine was designed because there were a number of machine shops which could make such an engine.

In the middle of 1942 Admiral Vickery was advised by several manufacturers that they could undertake the machining of larger and more powerful engines, which was the thought in back of the Victory ship, and in August of 1942 I received a note saying that he would like to have that design developed, and the first design was developed using this reciprocating engine of the Lenz type of approximately 5,600 IHP.

Shortly after that the War Production Board informed us that some turbine and gear facilities could be made [162] available and coordination was made through the various manufacturers, principally Westinghouse, GE and Joshua Hendy to

(Testimony of Ivan Joyce Wanless.)

produce units of the type employed in the C2 and C3 cargo vessels.

Q. Did you personally prepare the original AP or Victory ship design for the Commission?

A. Yes, sir. I might add there was a variation of the Victory ship design for Diesel engines but only one was ever produced. The reciprocating engine failed on test block so no ship was ever built of the original design concept.

Q. I call your attention to the Maritime Commission designation VC2-S-AP2. Are you familiar with the meaning of that designation?

A. Yes, sir.

Q. Will you please state the meaning of the designation?

A. I would like to trace the origin of that. In August of 1942 I was given a directive to prepare a 15 knot cargo ship design with the same characteristics as the Liberty ship so far as cargo, deadweight and cubic were concerned. That, according to our system of designation, became -AP. During the interim stage it was designated as C-X-AP. When we had finally settled on dimensions it finally became C2-S-AP1, which was the designation for the original reciprocating design.

The AP2 later became the same type with C2 type [163] machinery.

The AP3 was the same ship with the C3 type machinery.

Q. Pardon me for interrupting, Mr. Wanless, so that at the time of trial there will not be objec-

(Testimony of Ivan Joyce Wanless.)

tion that your testimony is not responsive to any question, it is necessary that I ask specific questions and you answer those questions specifically and then you are permitted to explain your answer.

Now, my present question, merely so that we will have a proper record for court, is for you to state the meaning of the symbol VC2-S-AP2. After having stated that you are at liberty to explain it.

A. The "V" stands for the Victory ship, as it was known, corresponding to the "E" which was the emergency ship, or the Liberty type as it became known.

The "C" stands for cargo vessel.

The "2" means a cargo vessel between 400 and 450 feet long.

The "S" means it is of steam propulsion; that is, geared turbines.

The "AP" is a design designation as it falls into the Commission schedule, and the 1, 2, 3 or 4 as follows is the variation from the standard design.

Q. Referring, then, to the letters "AP" appearing just before the numeral 1, 2, 3, 4 or 5, as the case may be, how was the designation "AP" developed by the Commission? [164]

A. Because it was the design that was started after AO; well, it goes AA; AB; AC and all the way through the alphabet. As each design comes along we give it a number. We started out with "A" originally and went on through the first alphabet and then the second, and we are now up to the "D" design which I previously referred to.

(Testimony of Ivan Joyce Wanless.)

Q. Does the "AP" as used by the Maritime Commission have any connection whatsoever with the "AP" as that letter may be used by the Navy Department in designating certain vessels as either "APA" or "AKA"?

Mr. Penz: Just a minute. I am going to make a technical objection to the question as follows:

I object to the form of the question in that it calls for a conclusion of the witness concerning matters pertaining to the United States Navy on which he has not been qualified as an expert to render an opinion.

Mr. Walkup: I will withdraw the present question.

Q. (By Mr. Walkup): I will ask you if in determining the symbol "AP2" the Commission acted entirely independently? A. Yes.

Mr. Pentz: Will that answer be stricken to give me a chance to object? Will you stipulate that it may be?

Mr. Walkup: Yes.

Mr. Pentz: May I hear the question read back? [165]

(Thereupon, the question was read by the reporter as follows:

"I will ask you if in determining the symbol 'AP2' the Commission acted entirely independently?")

Mr. Pentz: I object to the form of the question as calling for a conclusion of the witness.

(Testimony of Ivan Joyce Wanless.)

Mr. Walkup: You may answer the question.

A. I explained that the "AP," when the design was proposed, was merely in the next series of letters in our usual scheduling of designs, and was solely the Commission's business and no one else's. In fact, it has caused a great deal of confusion by the way we did the thing.

Q. (By Mr. Walkup): Do the letters "AP" as used by the Commission in the symbol VC2-S-AP2 have any connotation so far as the Commission is concerned with the terms "attack cargo"?

A. No, sir.

Mr. Pentz: Wait a minute; your answers are a little quick there. I would like to have the question read back, please. May it be stipulated that the answer is stricken?

Mr. Walkup: Yes.

(Thereupon, the question was read by the reporter, as follows:

"Do the letters 'AP' as used by the Commission in the symbol VC2-S-AP2 have any connotation so far [166] as the Commission is concerned with the terms "attack-cargo?"")

Mr. Pentz: I object to the question as calling for a conclusion of the witness.

Mr. Walkup: You may answer that.

A. The designation "AP" has no connection whatsoever with any Navy designation such as "Attack Cargo."

Q. (By Mr. Walkup): Does the designation

(Testimony of Ivan Joyce Wanless.)

“AP,” as used by the Maritime Commission, have any connotation in the Commission as “Attack Personnel”?

Mr. Pentz: I object to the question as calling for a conclusion of the witness and on the further ground he is testifying concerning things on which he has not been properly qualified as an expert.

Mr. Walkup: Well, on that point he is the man who makes up the symbols for the Commission.

Mr. Pentz: Let's not argue about it. You just ask your questions.

Mr. Walkup: Will you answer the question, please?

A. It does not.

Q. (By Mr. Walkup): Does the designation “AP” as used by the Commission in its symbol VC2-S-AP2 refer to auxiliary transport?

Mr. Pentz: May I have that question [167] read?

(Thereupon, the question was read by the reporter as follows:

“Does the designation ‘AP’ as used by the Commission in its symbol VC2-S-AP2 refer to auxiliary transport?”)

Mr. Pentz: I object to the question as being leading.

Mr. Walkup: You may answer.

A. Neither letter in the designation has any meaning in itself.

Q. (By Mr. Walkup): For purposes of clarification, I now hand you a document consisting of

(Testimony of Ivan Joyce Wanless.)

four pages dated October 1, 1947, and ask you please to identify that for the record.

A. This document was prepared by my office as of this date from a request received last week from Commissioner Carson for clarification of the various design letters of the Commission.

Q. When you say "this date" you are referring to the date appearing on the document?

A. I am referring to the date appearing on the document.

Q. October 1, 1947?

A. Correct. These design letters were assigned starting back in about 1939 as we started the various designs as listed here. [168]

After finishing the first alphabet, and as can be seen here——

Q. On page 2, in the column entitled "Design Letter"?

A. Yes. The "AP" design came after the "AM"; "AN"; "AO"; and "AP."

The AO was not used in order to avoid confusion with Navy designations.

Q. Referring further to the document that you have just identified, is this document an official record of the Maritime Commission? A. It is.

Q. And was it prepared by you in the official course of your duties for the United States Maritime Commission? A. It was.

Q. And is the original of this document on file in the "Preliminary Design Branch of the United States Maritime Commission"? A. It is.

(Testimony of Ivan Joyce Wanless.)

Q. And has this document, of which this is a copy, been circulated to various other branches of the Commission as an official publication to be used by other branches of the Commission?

A. It has.

Mr. Walkup: Will you kindly mark this for identification as Plaintiff's Exhibit HH? [169]

(Certified copy of four-page document entitled "Design Filing System" was marked Plaintiff's Exhibit HH for identification.)

Q. (By Mr. Walkup): Referring further to Plaintiff's Exhibit HH for identification, does the symbol VC2-S-AP appear in the exhibit?

A. It does.

Q. Will you point it out?

(The witness complies with counsel's request.)

Q. You are now designating page 2 of the exhibit?

A. That is right; AP1 to 7, meaning 7 in the AP design, Victory cargo.

Q. Then does the AP1-7 indicate you have symbols VC2-S-AP1, VC2-S-AP2, VC2-S-AP3, et cetera, to and including VC2-S-AP7?

A. It does, although not all have been built. AP1 was not built, as previously explained.

Q. Opposite that symbol on page 2, to the left, appears the words "Victory cargo ship." What is the significance of that wording appearing under the heading "Description"?

A. The original description was a cargo ship and

(Testimony of Ivan Joyce Wanless.)

because it was going into quantity production as part of the emergency program they did not want to let it stand as a straight C2. They did not want to call it an emergency ship and confuse it with a Liberty type which was EC2, so the [170] Victory was suggested and that is why it became the VC2.

Q. When you refer to that are you referring to your differences in determining these symbols?

A. The description of the Victory and the acceptance of it came from the Commission itself.

Q. Through your section? A. Yes.

Q. Which in turn prepared the official designation?

A. Yes. We prepare everything except such as prefixes as VC2 or EC2. There is a standard nomenclature: "B" means barges where "C" means cargo. "N" means coaster; "V" means tug, and so forth.

Q. You have explained the meaning of the symbol VC2-S-AP2. Will you now please explain the meaning of the symbol VC2-S-AP3?

A. That is the same vessel with the C2 type machinery with 6,000 SHP type geared turbine, whereas the C3 type is 8,500 SHP type geared turbine.

Q. Do the other letters and numbers of the designation mean the same as in the case of the VC2-S-AP2? A. Yes, sir.

Q. Would you please explain the meaning of the designation VC2-S-AP5?

A. That comprised two types of vessels. Both

(Testimony of Ivan Joyce Wanless.)

the AP2 and AP3 types were modified to meet Navy requirements. [171]

Q. Would you state, please, the meaning of the entire symbol VC2-S-AP5?

A. Victory cargo ship, between 400 and 450 feet long, steam turbine design, AP 5th modification.

Q. Do you know the dates when these various designations were first officially used?

A. I made a note of that.

Q. Can you tell us by referring to your notes?

A. The AP designation was given September 22, 1942.

The AP2 designation was assigned on February 19, 1943, which is when we had intimation that the C2 machinery would be available.

The AP3 was assigned on March 4th of the same year when we were informed C3 machinery would be available.

Q. That is, March 4, 1943, was the first use of the designation AP3?

A. That is right. AP4 was assigned at the same time as AP2, which was February 19, 1943.

The reason for holding up on the designation of AP3 was that we had intimation, but not knowledge, that we could get the C3 machinery, and so the number was reserved to make AP2 mean C2 machinery and AP3 mean C3 machinery.

Q. What date was the symbol VC2-S-AP5 designated?

A. It was officially designated November 1, 1943.

Mr. Pentz: May I interrupt there a minute? I

(Testimony of Ivan Joyce Wanless.)

would [172] like to have the answer that Mr. Wanless has given to the date of adoption of VC2-S-AP2.

The Witness: February 19, 1943.

Q. (By Mr. Walkup): Are the various AP type vessels sometimes referred to by the Commission merely by the use of the last designation, that is, as AP2, AP3 or AP5, rather than the use of the entire symbol VC2-S-AP2, AP3 and AP5?

A. That is a common practice through the whole Technical Branch and most of the other branches dealing with the ships themselves.

Q. So the Maritime Commission's use of the term AP2 would refer to the full designation VC2-S-AP2 and accordingly the same as to the AP3 and AP5? A. That is correct.

Q. By whom were the designs for the AP series of vessels prepared?

A. By me and my staff.

Q. That is by the United States Maritime Commission? A. That is correct.

Q. Would you state, please, the mechanics of the actual preparation of the designs, that is, in outline form?

A. In my capacity of Preliminary Design we made such studies governing the varying dimensions, et cetera, to meet the requested characteristics. Those studies included [173] subdivision studies; weight estimates; basic structural sections and lines, together with estimates of power and speed.

(Testimony of Ivan Joyce Wanless.)

After some 25 or 30 studies an answer was reached which I recommended to Commissioner Vickery for acceptance and the same was accepted for development.

At that stage several of the Specialty Sections within the Commission made their comments, and the Engineering Section during that stage also developed the expected heat balance and tentative machinery layout. These plans were then given to George C. Sharp, who was retained by the Maritime Commission for the preparation of the contract drawings, specifications, and subsequent working drawings that were distributed to the various shipyards for the construction of the vessels.

Q. Could you identify Mr. Sharp further?

A. Mr. Sharp is a Naval Architect and Marine Engineer, who has offices at 30 Church Street, New York City. He is internationally known.

Q. He was employed by the Maritime Commission for the purpose of doing certain work in completing the designs for the AP series of vessels, was he?

Mr. Pentz: I object to the form of the question as leading the witness and also for calling for his conclusion on matters which he has not been qualified as an expert.

Mr. Walkup: I will reframe the question. [174]

Q. (By Mr. Walkup): In the Preliminary Design Section, Mr. Wanless, state the extent of your familiarity with Maritime Commission designs from the inception thereof to and including the comple-

(Testimony of Ivan Joyce Wanless.)

tion of the final working drawings, plans and specifications.

A. After completing the preliminary design we follow very closely certain phases of the same throughout the preparation of the contract plans, whether the same is done within the Commission or without, particularly regarding lines, subdivision and all matters affecting weights. This requires constant touch with whoever does the work, whether it is done by ourselves or by an agent.

Furthermore, we frequently check the work in the shipyard as well as approve within our section the vital key plans affecting the design and have final approval on the completed vessel as to subdivision, capacity, stability, both intact and damaged, which covers the inclining experiment and determination of center of gravity.

Q. In the performance of those duties of your office in connection with the AP5 vessels did you or did you not follow the work done by Mr. Sharp, as Naval Architect? A. Yes.

Q. And did you on behalf of the Commission periodically contact or keep in touch with Mr. Sharp's office as to the [175] progress of the work being done by him in completing the designs?

A. Not as to progress, but continuous touch as to the matters affecting the design in total and in detail.

Mr. Pentz: May I have the answer read?

(Thereupon, the answer was read as follows:

(Testimony of Ivan Joyce Wanless.)

“Not as to progress, but continuous touch as to the matters affecting the design in total and in detail.”)

Q. (By Mr. Walkup): Who had the final responsibility as between the Maritime Commission and Mr. Sharp for the AP design?

A. The Commission always holds the responsibility. Mr. Sharp did the work for us subject to detailed approval by the Technical Staff of the Commission.

Q. Will you explain further what you mean by “subject to detailed approval by the Technical Staff of the Commission”?

A. Each plan as prepared by Mr. Sharp was individually reviewed and approved by some member of the staff of the Commission, and the Commission maintained an office at 30 Church Street to facilitate and expedite this work.

Q. After the Commission did approve each separate plan, was such approval noted upon the drawings? A. It was noted upon all drawings.

Q. And have copies of those drawings been furnished [176] to your office?

A. The copies are on file with the Commission.

Q. Is that the procedure which was followed in the case of design represented by symbol VC2-S-AP5? A. That as well as all other designs.

Q. So that the procedure you have now described would be the procedure followed by the Commission in preparing the design for all of the AP type vessels? A. That is correct.

(Deposition of Ivan Joyce Wanless.)

Q. And are you personally familiar with that procedure? A. Yes, sir.

Q. Could you state briefly the basic differences between AP2 and AP5?

A. The AP2 was converted for Navy use. There was some change in armament, change in wattage, and the accommodations were increased to take care of Navy personnel. The subdivision was slightly modified to provide greater safety, but in such manner that it could be taken out.

The modifications were all made and kept to a minimum so as not to destroy the value of the vessel for its rehabilitation to a cargo vessel when the Navy had finished with its use.

Q. Who designed the conversion features of the AP5?

Mr. Pentz: Excuse me; I believe the last question was the difference between the AP2 and AP5, wasn't it? I [177] understood that to be the question.

Mr. Walkup: I withdraw the present question.

Q. (By Mr. Walkup): I will ask you, isn't it true that the AP5 is essentially an AP2 with certain conversion features? A. Yes, sir.

Q. Who designed the conversion features which distinguish the AP5 from the AP2?

A. I did in collaboration with other sections of the Technical Bureau. Seeing that the conversion features were what are normally termed as minor and not affecting the basic design, the details of each regarding electrical, mechanical arrangements

(Deposition of Ivan Joyce Wanless.)

were handled by the Design Development Sections, but we were intimate and familiar with all those because of the necessity of maintaining a check on weight and stability.

Q. When you say "we," are you referring to the United States Maritime Commission?

A. No, the Preliminary Design Branch.

Q. So that the design of the conversion features which distinguishes the AP5 from the AP2 was a design made by the Maritime Commission?

A. Yes, sir. The Navy Department requested a certain type of conversion to which the Commission could not agree, and the final result was the compromise to permit future restoration. [178]

Q. Will you please elaborate or explain further your reference in your last answer to "future restoration"?

A. These vessels were designed as cargo vessels and for a great deal of use on a number of trade routes throughout the world. Since the war has been over there are applications for purchase; all vessels have actually been sold out of the two groups AP2 and AP3 to the extent of about 120 and there are about another 30 or 40 particularly foreign interests interested in acquiring considerable of these vessels of all three types, AP2, AP3 and AP5.

Q. By the term "future restoration," then, did you refer to the possibility existing at the time that the AP5's were built that they might later be restored to cargo vessels?

A. They are now in progress.

(Deposition of Ivan Joyce Wanless.)

Q. That is, some of them are?

A. Some of them. On all classes it was necessary to remove military features, such as the guns and degaussing, Navy gunner quarters, and things of that nature to return them to their original design, peace-time status. That applies to all merchant vessels of the United States which were used during the war.

Q. Does it apply to the AP2, AP3 and AP5 series? A. Yes, sir.

Q. Mr. Wanless, are you familiar with the degaussing system of the AP2 and the AP5? [179]

A. I am familiar with degaussing insofar as the same is generally installed affecting the arrangement, et cetera.

The detail and principles of degaussing I am not qualified to speak on, such as the number of coils and the amount of flux and current, but insofar as degaussing and its effect on installation and the way it is installed on the ship, I am.

Q. Did the degaussing system on the AP5 classification differ from the degaussing system on the AP2 classification?

Mr. Pentz: I will object to that question on the ground that there has been no showing that an AP2 classification ship had degaussing apparatus.

Mr. Walkup: I will ask the preliminary question then to meet the objection.

Q. (By Mr. Walkup): Did the AP2 classification have a degaussing system?

A. All vessels constructed after 1941 had in their

(Deposition of Ivan Joyce Wanless.)

contracts provision for the installation of degaussing when required by the Navy, and all vessels which were completed after December 7, 1941, had degaussing installed.

The AP2 specification called for a degaussing system to be installed as a change under the contract, if so ordered, and it was so ordered on all vessels.

Q. Was the degaussing system on the AP5 different from the degaussing system on the AP2? [180]

A. The specifications called for the degaussing in the AP5 contract. The installation was not materially different.

Q. And on the AP2 class of vessels was there a voice tube installation?

A. All cargo vessels normally have voice tubes installed for direct communication between certain vital centers such as housetop to wheelhouse and others.

Q. Was that true in the case of AP2 design?

A. Yes.

Q. And was the voice tube equipment on the AP5 different from the voice tube equipment on the AP2?

A. Several were eliminated from the AP5 design and others were added, but the over-all installation is about the same. It depended upon the rearrangement of the space.

Q. When you say that several were eliminated, are you referring to several of the voice tubes?

(Deposition of Ivan Joyce Wanless.)

A. Yes, sir, and several were added, so that it balances out about the same.

Q. In other words, would it be correct to say that the total amount of voice tube installation in the AP5 would be substantially the same as the total amount of voice tube installation on the AP2, except that the location and arrangement of the voice tubes might be different?

A. Yes. You can refer to the specifications of the two [181] vessels for clarification.

Q. Did the AP2 classification have a mechanical telegraph? A. Yes, sir.

Q. Did the AP5 classification have a mechanical telegraph? A. Yes, sir.

Q. Were the mechanical telegraph arrangements on the AP2 the same or different from the mechanical telegraph arrangements on the AP5?

A. The AP2 had a straight commercial type telegraph which was used on the AP5 with one additional indicator, and the other change was in the engraving on the dials, which was changed from commercial standard to Navy standard terms, after much heated argument.

Q. Did the AP2 series have a radar installation?

A. No.

Q. Did the AP5 series?

A. Yes. The Navy supplied a radar installation which was installed by the contractor.

Q. Did the AP2 series have a system of mechanical wireways?

A. All vessels have metal protection or wire-

(Deposition of Ivan Joyce Wanless.)

ways, but the AP5 did have a greater amount than the AP2.

Q. The AP2 and the AP5 both had mechanical wireways, [182] but the AP5 had a greater amount?

A. Yes.

Q. Could you give us your best judgment as to the relative proportions of the mechanical wireways on the AP2 and the AP5 on a percentage basis?

A. That would be rather hard to do without a detailed study of the plan, but an estimate would be about 200 per cent more.

Q. On the AP5?

A. On the AP5. The AP2 installation would be confined to the living quarters basically, whereas the AP5 had the quarters extended through a greater portion of the vessel and required such protection to a greater extent.

Q. Mr. Wanless, are you familiar with the use of the term "base vessel"? A. Yes.

Q. What is the meaning of that term as used by the Commission?

A. When we make a design it has a designation such as the vessel in question "AP." That becomes a base vessel and all our estimates, both for weight and cost, et cetera, are based upon such a base vessel.

Q. Is the base vessel the same in the AP2 and the AP3?

A. No. There we knew a difference in machinery that would arise, as we did on the AP4, so an indi-

(Deposition of Ivan Joyce Wanless.)

vidual base cost [183] was established for each of those three types of ship.

Q. Is the base vessel on the AP2 the same as the base vessel on the AP5?

A. Yes, the AP5 had two base vessels, the AP2 and the AP3.

Q. Would the AP5 be in effect either an AP2 or an AP3 base vessel with conversion features typical of the AP5?

A. That is correct, except that the AP3 conversion was to have been called AP6.

Q. How would you characterize the base vessel of the AP series?

A. It is a cargo vessel, having approximately 14,600 tons deadweight, around 500,000 cubic feet cargo capacity; five holds, with machinery capable of 15 knots or better, depending upon the type of machinery installed, with normal type of cargo handling and accommodations for a merchant crew of approximately 50.

Q. With further reference to your experience and qualifications, did you testify that you served three years with the Navy Department, Bureau of Ships?

A. Yes, sir. I was three years with the Preliminary Design Section of the Bureau of Ships.

Q. Are you familiar with the Navy design designations? A. Yes, sir.

Q. I will ask you again if the Maritime Commission "AP" as used in the Maritime Commission designation VC2-S-AP2, [184] AP3, AP4 and AP5

(Deposition of John Bassette Maher.)

has the same meaning as the letters "AP" appearing in the Navy designation "APA"?

A. None whatsoever.

Mr. Pentz: Will you agree that answer may be stricken?

Mr. Walkup: Yes.

Mr. Pentz: I object to the question on the ground that there has been no foundation laid to qualify Mr. Wanless as an expert in the United States Navy insofar as their designations are concerned, and on that ground I object to the question as calling for a conclusion.

Mr. Walkup: I will withdraw the question and ask further questions relating to qualifications.

Q. (By Mr. Walkup): What type of work did you do during the three years in the Navy Bureau of Ships Design Section?

A. I did basic design work on all classes of Naval vessels, covering both auxiliaries and combatant type vessels, similar to the type of work I am doing in the Maritime Commission.

Q. Did your work in that capacity cause you to become familiar with the Navy vessel designations?

A. Yes, indeed. We designed all types, and in preparing such designs we had to label the proper designations.

Q. Do you know the meaning of the Navy symbol APA? A. Yes, indeed. [185]

Q. Will you now state whether the use of the letters "AP" appearing in the Maritime Commission designation VC2-S-AP2 to and including AP5

(Deposition of John Bassette Maher.)

has the same meaning as the letters "AP" appearing in the Navy designation "APA"?

Mr. Pentz: I object to the question on the ground Mr. Wanless has not been properly qualified as an expert insofar as the meaning of U. S. Navy ship designations is concerned, and on that ground I object to the question as calling for his conclusion.

Mr. Walkup: Will you answer the question, please?

A. None whatever. As I previously stated, we deliberately endeavored to avoid conflict with Navy designations and that is why "AO" was not used. "AP" was selected while I was not here and it became a matter of record and I approved it after I came back, not knowing the vessels would go to the Navy.

Q. (By Mr. Walkup): You say while you were not here; do you mean during your temporary absence from the Commission?

A. That is correct. I was out of town for a day when the request came for a design designation to be given to this new cargo vessel, the Victory type, and we had deliberately omitted the AO design so as not to confuse with the Navy tankers which are designated AO.

Mr. Walkup: I would like to offer in evidence Plaintiff's [186] Exhibit HH for identification.

(The document heretofore marked Plaintiff's Exhibit HH for identification was offered in evidence as Plaintiff's Exhibit HH.)

Mr. Walkup: No further direct examination.

(Deposition of Ivan Joyce Wanless.)

Cross-Examination

By Mr. Pentz:

Q. Mr. Wanless, I believe you testified in substance that you or your department had charge of making the plans to meet the requested characteristics for the vessel known as VC2-S-AP5. Is that correct?

The Witness: Will you repeat the question, please?

(Pending question read.)

A. The preliminary design plans were the ones that we prepared; they are a necessary prerequisite to the preparation of final design plans and working drawings.

Q. When you make those plans, Mr. Wanless, you make them to fit with characteristics you want to incorporate in a ship? A. That is correct.

Q. Were there certain characteristics you wished to incorporate in the ship more commonly known as AP5? A. There were.

Q. Who decided what those characteristics should be?

A. We had a directive received from the Joint Chiefs [187] of Staff to make certain commercial tonnage available and it was finally decided that the Victory type ship could probably be best altered with least harm to its future commercial possibilities to meet the requirements of installing the Navy personnel and other features such as boats and guns.

(Deposition of Ivan Joyce Wanless.)

Q. You say it was finally decided. Who decided it?

A. I believe that decision rested with Admiral Vickery.

Q. Admiral Vickery at the time was Chairman of the Maritime Commission?

A. He was Vice Chairman and in charge of the building program.

Q. Insofar as the characteristics that these vessels should have, and I have reference to the VC2-S-AP5's, what conversations, if any, did you or your department have with representatives of the United States Navy? A. Quite a few.

Q. Did these conversations have to do with the characteristics to be incorporated in an AP5?

A. Yes.

Q. I wish you would state in substance all you know about those conversations.

Mr. Walkup: I object to this as no proper foundation has been laid.

Mr. Pentz: Withdraw the question. [188]

Q. (By Mr. Pentz): Were you present during times when there were conversations between representatives of the United States Navy and representatives of the Maritime Commission concerning the characteristics which should be incorporated in the AP5 type vessel? A. Yes.

Q. Where did that take place?

A. All over the United States.

Q. Will you relate what you can insofar as your

(Deposition of Ivan Joyce Wanless.)

recollection of what the general substance of those conversations was?

Mr. Walkup: I still object to that. There is no proper foundation laid as to any particular conversation; no showing of the times, places, and persons present.

Q. (By Mr. Pentz): Mr. Wanless, tell me the time of the first conversation that you can recall.

A. It was sometime the latter part of October, 1943.

Q. And where did it take place?

A. In the Maritime Commission.

Q. And who were present, as well as you recall?

A. Well, I can name Captain Sledge of the Navy, for one; James L. Bates; I am not certain if Admiral Vickery was there; Mr. Rohn, [189] probably.

Q. What was discussed between the gentlemen at that time and place concerning the characteristics that should be included in the AP5 type vessel?

A. The first conversation that we had the Navy presented a list of characteristics of a cargo type ship which they had converted themselves, and requested our opinion as to whether we could provide such additional installations on our AP2 or AP3. They preferred the AP3 type vessel.

Q. Do you have in your present custody the list of characteristics that the Navy presented to you that you refer to?

A. I do not believe that is readily available, as those figures are things of the past and have been stored God knows where.

(Deposition of Ivan Joyce Wanless.)

Q. Tell us as well as you can some of the principal features of these characteristics that were then presented.

A. The principal features were accommodations for an increased number of crew to man the vessel.

Q. About how much increase, do you recall?

A. From about 50 to about 250 to 275; provisions for berthing some 1,500 officers and troops and a change in the type of lifeboats and provision for storing on the hatches tank vehicles, and a change in cargo gear necessary to handle the heavier loads.

I mentioned earlier an increased standard of subdivision [190] and the provision of certain Navy communications features, such as radio, radar; and one of the requests was the adoption of Navy standards in many features, which was denied vigorously because this was still a commercial vessel and built for commercial requirements.

Q. Are you familiar with the provisions of a Federal law passed June 17, 1943, designated as 57 Stat. 156?

A. I am not a lawyer.

Q. Would you mind answering the question, please? I didn't ask you whether you are a lawyer.

A. I am not familiar with said law.

Q. I will read it to you:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States is hereby authorized to acquire or to undertake the construction of 1,000,000 tons of auxiliary vessels of such size,

(Deposition of Ivan Joyce Wanless.)

type and design as he may consider best suited for the purposes of the prosecution of the war, such facilities to be in addition to those heretofore authorized.

“Section 2. Notwithstanding the provisions of any other law, any vessel intended for operation by the United States Navy, the construction or acquisition and conversion of which was heretofore or is [191] hereafter authorized by the Maritime Commission, the War Shipping Administration, or any other agency of the Government, shall be subject to the approval of the Navy Department in all matters of design and construction or conversion and the control, custody and sole right to possession of such vessel shall be transferred to the Navy Department upon the completion of such construction or conversion. Provided, That the authority contained in this section shall be limited to the tonnage authorization contained in Section 1 hereof and to similar authorizations heretofore or hereinafter acquired.

“Section 3. There is hereby authorized to be appropriated out of any money in the Treasury not otherwise appropriated such sums as may be necessary to effectuate the purpose of this Act.”

That law is commonly known as Public Law 76. Directing your attention more particularly to that portion of the language I have read, “Notwithstanding the provisions of any other law, any vessel

(Deposition of Ivan Joyce Wanless.)

intended for operation by the United States Navy, the construction or acquisition and conversion of which was heretofore or is hereafter authorized by the Maritime Commission, the War Shipping Administration, or any other agency of the Government, shall be subject to the [192] approval of the Navy Department in all matters of design and construction or conversion."

Does that law come to mind to you now?

A. No, sir.

Q. Did you in your capacity on behalf of the Maritime Commission design the AP5 vessel without knowledge of the existence of that law?

Mr. Walkup: Just a moment. Would you read the question back, please?

(Pending question read.)

I object to that on the ground it is incompetent, irrelevant and immaterial.

Mr. Pentz: You may answer it, subject to Mr. Walkup's objection.

A. I have no knowledge of that law.

Q. (By Mr. Pentz): What further, if any, characteristics were contained in the list of desired characteristics for the AP5 type vessel that you have previously identified as having been handed to you or to members of your department?

A. Well, the general list runs: A certain amount of accommodation; certain provision for battery; for boats; for cargo stowage; for stores and for cruising radius; for water supply, and I mentioned communications before, and that covers in general

(Deposition of Ivan Joyce Wanless.)

the broad field, unless you want to get down [193] to pots and pans and equipment and outfit which is stored on the vessel, which the Navy supplied.

Q. I am only interested in the important features.

Now, there were changes from time to time thereafter in connection with these desired characteristics by the Navy, were there not?

Mr. Walkup: I object to the form of the question. What do you mean by "thereafter"? Would you clarify that point?

Mr. Pentz: When I used the word "thereafter" I had reference to the time you had testified to when the Navy first presented its desired characteristics for the vessels.

A. The desired characteristics were never accepted by the Maritime Commission.

Q. (By Mr. Pentz): What portion of the characteristics that were originally desired by the Navy Department were modified?

A. The berthing and troop capacity.

Q. Let's take them one at a time. The berthing and what? A. Troop capacity.

Q. To what extent was the Navy's original request changed?

A. Reduced about ten per cent.

Q. Very well. You may proceed. [194]

A. The cargo capacity likewise was reduced to that amount or perhaps a little bit more.

The request for the use of Navy standards in equipment, outfit and other matters which would

(Deposition of Ivan Joyce Wanless.)

require change from a commercial vessel were denied.

Q. What do you mean "changed to Navy standards"? What do you have reference to?

A. The Navy Department has certain standards regarding structure; wiring; they had a certain type of winches; connection boxes; switch gear; condenser heads; forced draught control; and similar things of that nature which, if we would have changed, would abrogate the requirements of the Merchant Classification Societies and destroy the future usefulness of the vessel as a commercial vessel, so consequently the changes were refused.

Q. You have listed a series of categories of items that you in your terminology have referred to as Navy standards. Let's take them one at a time, and I want you to tell me to what extent in each category the Navy's original request for characteristics was not used in the AP5 design.

A. We did not use Navy structural standards for the design of the additional bulkheads, deck-houses and other steel work, but followed the rules of the American Bureau of Shipping.

Q. So far as that is concerned, though, you [195] did incorporate in the features of the AP5 vessel the facilities for the type of compartment that the Navy desired?

A. Yes; we provided the facilities and then arranged to take them off without hurting its future use.

Q. What features of the characteristics requested

(Deposition of Ivan Joyce Wanless.)

by the Navy Department were eventually retained in the form of the completed AP5 vessel?

A. May I ask for a clarification of that question? Do you mean what was added to the vessel——

Q. I will make this statement in order to help clarify the matter:

You have testified that the Navy Department—in substance you have testified that the Navy Department came to the United States Maritime Commission and asked that certain characteristics be incorporated in an AP5 type vessel. Tell me, if you will, please, which of the characteristics they requested were eventually retained as a part of an AP5 vessel?

A. Features necessary for a Navy operation, such as installation of the crews' quarters and the change in boats; the changes in the handling gear; the changes in communication, such features which were necessary for the limited Navy operation.

Q. Am I to believe that in the preparation for the plans for this vessel you followed Naval requests in connection with those features of the [196] vessel?

A. Only those that were added or furnished by the Navy.

Q. What do you mean by "only those that were added or furnished by the Navy"?

A. We couldn't get any Navy material and consequently if the Navy was willing to furnish it, like radar, why, we arranged for the installation of it, but insofar as changing a great deal of the basic

(Deposition of Ivan Joyce Wanless.)

wiring, piping, et cetera, to conform to Navy practices, we did not do that.

Q. I am asking what you did conform to the Navy's request?

A. That which we put into the vessel; Navy berths, Navy mess gear, Navy ranges in the new galley, Navy boats; of course, Navy type bins, shelving and other storage facilities.

Q. Have you exhausted your information on what features of these vessels were——

A. No, there are about 2,300 odd items that you could name that you could put in one or put in the other and take it out again.

Q. Have you any knowledge as to the manner in which the AP5 type of vessel stowed small boats?

A. Yes, sir. They had triple back davits; I forget now from memory whether there were four or six in all, plus several more on the hatches, and then they had two LCM's [197] in addition to the LCVP's which were stowed in the landing boat davits——

Q. What do you mean by "LCM"?

A. Landing craft medium.

Q. And what do you mean by "LCVP"?

A. Landing craft vehicle and personnel.

Q. About how long an outfit, roughly speaking, is an LCM?

A. An LCM weighs 30 tons and is approximately 50 feet long and 12 to 14 feet wide.

Q. Did the Navy request that as one of the features of the AP5 that there be facilities on such a

(Deposition of Ivan Joyce Wanless.)

vessel for the stowage of LCM's? A. Yes, sir.

Q. Describe the extent that that feature was incorporated in an AP5 type.

A. Brackets were placed on deck abreast the hatches and arranged to form a cradle so that the LCM could be dropped into the cradle and lashed in place while at sea and was lifted off by the cargo boom.

Q. Did the Navy request that you incorporate as a part of the characteristics for an AP5 vessel facilities for the stowage of LCVP's?

A. Yes.

Q. Will you please describe what that characteristic [198] of the AP5 was?

A. Several of them were stowed similarly to the LCM's. The balance were stowed under special design Navy type which the Navy furnished, which was merely welded to the deck and carried two boats within its cradle and one stowed in between so it could be lifted out after the other boats were out.

Q. Did the United States Maritime Commission incorporate any characteristics in the AP5 type vessel to accommodate the placement of guns?

A. Yes, sir.

Q. The United States Navy requested that guns be placed in particular positions on the ship, did it not?

A. Yes, sir; they specified them on all types, AP2's, AP3's and AP5's.

Q. And, as a matter of fact, it is true that the

(Deposition of Ivan Joyce Wanless.)

position of guns was changed from time to time before the final plans and specifications were complete? A. That is true.

Q. And those changes were accomplished as a result of a request therefor by the United States Navy; is that not true? A. That is correct.

Q. Is it not true that these other characteristics of an AP5 vessel requested by the Navy were in turn changed from time to time at the request of the United States Navy?

A. No, not the major ones involving the basic ship, [199] which I stated was on structure, and other wiring, piping, et cetera, were not changed.

Q. You are quite positive of that?

A. I am quite positive.

Q. Would you consider quarters for the entire officer-personnel of an AP5 as a minor change?

A. The way it was done, yes, because we merely added a deckhouse and reassigned the rooms in the existing deckhouse.

Q. Are you quite positive the only change during the course of the final preparation of an AP5 plans and specifications, that the only change insofar as the quartering of officers was the erection of a deckhouse, or whatever you last said?

A. You didn't let me finish; the additional deckhouse plus the rearrangement and reassignment of rooms inside; the furniture was changed, which the Navy supplied in general, and a couple of partitions were removed.

Q. Are you quite sure that is the full extent?

(Deposition of Ivan Joyce Wanless.)

A. Well, the lighting, et cetera, had to be modified to suit. I mean when you put it back again you can use the same lighting you have, so that is why we acquiesced.

Q. Would it refresh your recollection if I call your attention to the fact that originally the quarters for officers were in a position in the ship quite deep? By that [200] I mean below the water line.

A. Mr. Pentz, I know of no vessel which has quarters for officers or crew below the water line.

Q. Would it refresh your recollection if I ask you is it not a fact that the United States Navy found that condition to be true and requested the United States Maritime Commission that the plans and specifications be changed so that those crew and officer quarters would be taken to an upper part of the ship?

Mr. Walkup: I object to the form of the question; it is complex and calls for a conclusion and opinion of the witness.

Q. (By Mr. Pentz): I will ask you, Mr. Wanless, whether or not there was ever a time when the United States Navy requested the United States Maritime Commission to incorporate in the AP5 plans and specifications quarters for officers in a higher position in the ship than that position which was originally designated?

Mr. Walkup: "To the witness' knowledge," Mr. Pentz, would you add that?

Mr. Pentz: If you know?

A. The officers' quarters in the AP5 design were

(Deposition of Ivan Joyce Wanless.)

in the same location as in the AP2 design, and those officers' quarters are above the main deck level. [201]

Mr. Pentz: Will you repeat the question? And I will ask you, Mr. Wanless, to try and answer the question.

(Thereupon the following question was read by the reporter:

"I will ask you, Mr. Wanless, whether or not there was ever a time when the United States Navy requested the United States Maritime Commission to incorporate in the AP5 plans and specifications quarters for officers in a higher position in the ship than that position which was originally designated, if you know?")

The Witness: Designated by whom?

Q. (By Mr. Pentz): I meant by that yourself, Mr. Wanless?

A. No, sir. The quarters as completed in the vessel were the same as were laid out on the preliminary plans; the same relative locations with minor changes.

Q. Is it a fact that the quarters for officers were changed at the request of the United States Navy because where they had originally been designated to be by the United States Maritime Commission there were not ample facilities for ventilation?

A. Not to my knowledge, and I was very intimate with the design at that stage.

Q. What do you know about the placing of 3-inch gun [202] mounts in connection with the final AP5 plans and specifications?

(Deposition of Ivan Joyce Wanless.)

A. Three-inch gun mounts were placed two forward and two aft at the quarterpoints. They were moved slightly after the rigging arrangement was known and they were moved fore and aft or inboard or outboard slightly, and later on certain supplemental platforms were built on to take care of directors and the radar equipment for the 40-millimeter guns.

Q. That was at the request of the United States Navy?

A. Yes, the Commission having no control over armament.

Q. Mr. Wanless, Mr. John Bassette Maher, of the Division of Accounts, United States Maritime Commission, has testified in these proceedings that the approximate estimated cost of the conversion features of 22 AP5 type vessels was \$34,213,000. With that statement in mind, are you confident that you have given us all of the structural features and characteristics of the AP5 type vessel which distinguishes it from the other AP type vessels?

A. I believe I have, although I have nothing to do with the cost itself and have no knowledge of the costs.

Q. How many times offhand or approximately would you say that you or your department, members thereof, consulted with representatives of the United States Navy concerning the features of these facilities desired by the United States Navy? [203]

A. We probably had in the beginning of the design seven or eight major conferences, among which

(Deposition of Ivan Joyce Wanless.)

you might call a meeting of the staff officers, and then there were many, many conferences, 50 or 60, et cetera, among one or more members of the Commission with one or more members of the Navy handling some particular feature.

Q. In the first seven or eight conferences that you described as more or less staff conferences between representatives of the two agencies, am I correct in presuming that the over-all characteristics desired by the Navy in this AP5 type vessel were discussed? A. That is correct, sir.

Q. And am I correct in assuming that in those meetings the representatives of the United States Navy made their requests as to these over-all features that they desired to be incorporated in the AP5's? A. They did, sir.

Q. Am I correct in assuming that the various and sundry meetings that you have mentioned as having occurred after that time, with persons in lower rank in the respective organizations, had to do with changes of more a minor nature than were requested by the Navy? A. Yes, sir.

Mr. Pentz: I would like about a five-minute intermission.

(Thereupon, a short recess was had.) [204]

Q. (By Mr. Pentz): Now, Mr. Wanless, referring your attention to the preliminary eight meetings, or thereabouts, that you have referred to as having taken place between the higher ranking officers of the United States Maritime Commission and the United States Navy concerning these AP5's,

(Deposition of Ivan Joyce Wanless.)

can you tell us roughly over what period of time these meetings took place?

A. The first information I have in my file is in the latter part of October and it was the first of November of that year.

Q. Of what year?

A. 1943, that the design was assigned and the conferences regarding the major characteristics and policies continued, I would say, until the middle of January or first of February at intervals about each two weeks.

Q. And by the first of January or February you mean 1944? A. 1944.

Q. Were you present at any of those meetings?

A. Practically all of them, sir.

Q. At any of those meetings did a representative or representatives of the United States Navy acquaint you with the purposes for which the Navy intended to use this proposed vessel?

Mr. Walkup: Object to as no proper foundation having [205] been laid.

Mr. Pentz: You may answer it subject to Mr. Walkup's objection.

A. I was told they were to be used by the Navy——

Mr. Pentz: Just answer it yes or no.

May we have that question read back?

(Thereupon, the following question was read by the reporter:

“At any of those meetings did a representative or representatives of the United States

(Deposition of Ivan Joyce Wanless.)

Navy acquaint you with the purposes for which the Navy intended to use this proposed vessel?")

A. Yes.

Q. (By Mr. Pentz): When was the first meeting, if you can recall, to the best of your recollection, that that subject was mentioned?

A. My first recollection or record is October 26 at which time the Navy Department had already contacted Admiral Vickery regarding the use, and I was informed through Admiral Vickery to attend this meeting for this conversion.

Q. Where did the meeting take place, if you recall?

A. I believe in Admiral Vickery's conference room, 4834 of the Commerce Building.

Q. And as well as you remember, who were present?

A. I already stated those that I could remember. [206]

Q. What was said, as well as you recall, in substance, concerning the purpose for which the United States Navy desired these?

A. They wanted these vessels to be converted similar to some they had done themselves, and furnished us plans for guidance, together with the specifications of the alterations they had made to those other vessels.

Q. What was said, if anything, concerning the purpose they wanted to use those vessels for?

A. They wanted to use them as transports for advanced work purposes.

(Deposition of Ivan Joyce Wanless.)

Q. Were you informed at that meeting by any representative, or representatives, of the United States Navy, what was meant by "advanced work purposes"?

A. Yes. They were to carry or transport a division of troops, which was then designated as a combat division. In other words, it was merely a unit which worked together on land and was transported by these vessels on sea, the same as any other service.

Q. Were you further informed at that meeting by any representative of the United States Navy any more detail as to how these ships were to operate than what you have just said?

A. Operational plans were discussed and had been discussed previously, but I don't feel that I am qualified or [207] in a position to state information that was then classified as secret and still classified as confidential.

Q. I will ask you to relate what conversations you heard at that time concerning the use to which the United States Navy was to place those vessels?

Mr. Walkup: Off the record.

(Then followed a discussion off the record.)

Mr. Pentz: I will withdraw that question.

Q. (By Mr. Pentz): At that conference representatives of the United States Navy did discuss the nature of the use to which they proposed to place AP5 type vessels? A. Yes.

Q. To what extent are you willing to relate those conversations?

(Deposition of Ivan Joyce Wanless.)

A. The conversion was to be undertaken on the ground that these were not to be combatant vessels——

Mr. Pentz: Just a minute. I am going to move to strike that answer because the question calls for conversations as well as you can recall. Perhaps we should have the question repeated.

(Thereupon, the following question was read by the reporter:

“To what extent are you willing to relate those conversations?”) [208]

Mr. Pentz: I move to strike the answer as not being responsive to the question.

Now, will you read the question?

(Thereupon, the following question was read by the reporter:

“To what extent are you willing to relate those conversations?”)

Mr. Pentz: Let's have the question before that so we will know what conversations we are talking about.

(Thereupon, the following testimony was read by the reporter:

“Question: At that conference representatives of the United States Navy did discuss the nature of the use to which they proposed to place AP5 vessels? Answer: Yes.

“Question: To what extent are you willing to relate those conversations?”)

A. The conversations between Admiral Vickery

(Deposition of Ivan Joyce Wanless.)

and I am not certain who the Navy Admiral was, related to the fact that the vessels were to be used to transport a combat team to an advanced theater, together with its landing equipment, but that they were not to be considered in the combat category, following Navy standards of Navy basic design principles as far as Navy hull structure and machinery was concerned. It was on this basis only—— [209]

Q. (By Mr. Pentz, interposing): Are you still relating conversations?

A. I am still relating conversations—that Admiral Vickery agreed to accept the conversion of the vessels under contract and said that he would inform the Joint Chiefs of this decision.

Q. When you refer to the transport of a combat team to an advanced area, did not the purport of the conversation indicate that what was meant by that was the transport by the United States Navy of a combat team to a forward area?

A. I believe I so stated.

Q. Now, Mr. Wanless, tell us the extent of the armament aboard an AP5 as well as you know it.

Mr. Pentz: I will withdraw that question and reframe it in the following manner:

Q. (By Mr. Pentz): I appreciate, Mr. Wanless, that you are not testifying with the benefit of your records before you, and I therefore ask you to the best of your recollection, tell us the armament features of an AP5.

(Deposition of Ivan Joyce Wanless.)

A. 1 5-inch/38 double purpose aft.

4 3-inch AA guns.

I believe 4 40-millimeter AA guns.

12 20-millimeter guns, subsequently increased to 20. I might be wrong on the last. [210]

Q. Could you be wrong on the matter of the number and placement of the 5-inch/38 double guns?

A. I could be, but to the best of my knowledge I am correct.

Q. Do you know whether or not there was that type of armament located on the bow?

A. I do not believe a 5-inch gun was placed on the bow.

Q. Isn't it a matter of fact that one of the last changes that was made, at Navy request, was the placement of one 5-inch/38 double weapon on the bow?

A. I am not aware of that change.

Mr. Pentz: No further questions.

Redirect Examination

By Mr. Walkup:

Q. Mr. Wanless, I neglected to ask you this at the outset of the deposition: Have you been designated by the Chairman of the United States Maritime Commission as one of the persons to give certain testimony in these proceedings on his behalf?

A. I was so designated.

Q. You have testified on cross-examination with reference to certain conferences at which you were present between Maritime Commission and Naval

(Deposition of Ivan Joyce Wanless.)

officers. Subsequent to those conferences, as a result thereof, was there any change made in what you have described as the base vessel of the [211 & 212] AP2 or AP3 in converting it into an AP5?

A. No, sir.

Q. Were there any gun emplacements on the AP2 vessels? A. Yes, sir.

Q. And to what extent?

A. I believe the AP2's were equipped as most cargo standard vessels were at that time, with one 5-inch, two or four 3-inch, and six 20-millimeter guns.

Q. In your cross-examination you mentioned a conversation in Admiral Vickery's office at which a statement was made to the general effect that the AP5's were not to be considered in the combat category, or testimony to that general substance and effect. Will you please state by whom that was said and to whom, at this meeting?

Mr. Pentz: I would like to hear that question, and I intend to interpose an objection to it. Will you please read the question?

(Thereupon, the following question was read by the reporter:

"In your cross-examination you mentioned a conversation in Admiral Vickery's office at which a statement was made to the general effect that the AP5's were not to be considered in the combat category, or testimony to that general substance and effect. Will you please

(Deposition of Ivan Joyce Wanless.)

state by whom that was said and to [213] whom, at this meeting?")

Mr. Pentz: I am going to object to that question on a number of grounds:

First, whatever testimony Mr. Wanless gave on that point was not responsive to the question propounded to him and was a voluntary statement of his own; further, that in any event the nature of the question seeks to elicit from Mr. Wanless a conclusion.

'That is my objection.

Mr. Walkup: You may answer subject to the objection.

A. I do not remember who the Admiral was with whom Admiral Vickery had the conversation, but that was the agreement.

Mr. Pentz: I move to strike Mr. Wanless' voluntary interpretation and statement "that was the agreement."

The Witness: I said that was with whom he had the agreement.

Mr. Pentz: In order to get this entirely accurate, would you mind repeating Mr. Wanless' answer to Mr. Walkup's last question?

(Thereupon, the following answer of the witness was read:

"I do not remember who the Admiral was with whom Admiral Vickery had the conversation, but that was the agreement.") [214]

Mr. Pentz: I move that the words "but that was the agreement" be stricken as a voluntary state-

(Deposition of Ivan Joyce Wanless.)

ment on the part of Mr. Wanless, as his conclusion; it constitutes his interpretation.

Q. (By Mr. Walkup): Referring further to this conversation which Mr. Pentz asked about in his cross-examination, will you identify to the best of your present knowledge the persons present?

Mr. Pentz: I object to that question on the ground it has already been asked and answered.

Mr. Walkup: You may answer it again. We are trying to develop the facts.

A. May I ask if you mean Navy personnel primarily?

Q. (By Mr. Walkup): Well, I would like to have all of the people present, including Navy and Maritime.

Mr. Pentz: I object to Mr. Walkup's statement to the extent that it constitutes a further question, on the same ground as I have objected to his previous question.

Mr. Walkup: I will ask it again so that there will be no question as to what I am trying to develop.

Q. (By Mr. Walkup): Mr. Wanless, will you please state to the best of your present recollection the persons present at the meeting in Admiral Vickery's office concerning which you have testified in answer to questions directed to you by Mr. [215] Pentz, during cross-examination?

Mr. Pentz: I object to the question as having been heretofore asked and answered.

A. Vice Admiral Vickery; James L. Bates; E. S.

(Deposition of Ivan Joyce Wanless.)

Land, for a moment; Arthur C. Rohn; Ivan Wanless; Lieutenant William Weber. For the United States Navy: Captain A. Sledge; Captain Schuyler Pyne; Commander K. Romberg; Captain Barringer, and I still don't remember the name of the Admiral.

Q. (By Mr. Walkup): Is it your testimony, then, that there was another Navy Admiral present in addition to the Navy personnel you have identified?

Mr. Pentz: I object to that question on the ground that it is Mr. Walkup's interpretation of the testimony.

Mr. Walkup: I will reword the question.

Q. (By Mr. Walkup): You have stated that there was another Admiral present. Do you mean by that another Admiral in addition to Admiral Vickery and Admiral Land?

A. Yes; there was an Admiral representing the Navy Department.

Q. Could you identify Admiral Vickery and Admiral Land?

A. As representing the Maritime Commission, Vice Chairman and Chairman, respectively. [216]

Q. Could you identify Mr. Bates?

A. Mr. Bates is Chief of the Technical Bureau, the Director of the Technical Division.

Q. Of what?

A. The Maritime Commission.

Q. Could you identify Mr. Rohn?

A. Mr. Rohn and the others were staff members

(Deposition of Ivan Joyce Wanless.)

of the Maritime Commission, Lieutenant Weber being Admiral Vickery's aide.

Q. In the Maritime Commission?

A. In the Maritime Commission.

Q. Referring further to the conversation to which you have testified on cross-examination, in response to Mr. Pentz's question, relating to the conversation in Admiral Vickery's office, between whom was the conversation in which the statement was made in substance and effect that the AP5's were not to be considered in the combat category, or in substance and effect similar to that statement, as testified by you on cross-examination?

Mr. Pentz: I object to the question on the ground that any statement heretofore made by Mr. Wanless on that subject was a voluntary statement made by him, unresponsive to the question or questions propounded to him, and on the further ground that it calls for his interpretation and calls for his conclusions as to what took place. [217]

Mr. Walkup: You may answer that.

A. Admiral Vickery did the principal talking for the Maritime Commission, together with Mr. Bates. The principal talkers from the Navy were the Admiral, name unknown, and Captain Barringer and Captain Sledge.

Q. (By Mr. Walkup): Will you state, please, to the best of your present recollection, what was said, if anything, concerning the question of whether or not the AP5's under discussion were to be considered as in the combat category?

(Deposition of Ivan Joyce Wanless.)

Mr. Pentz: Just a minute. May I ask to have Mr. Walkup's previous question read?

(Thereupon, the following question was read by the reporter:

“Referring further to the conversation to which you have testified on cross-examination, in response to Mr. Pentz's question, relating to the conversation in Admiral Vickery's office, between whom was the conversation in which the statement was made in substance and effect that the AP5's were not to be considered in the combat category, or in substance and effect similar to that statement, as testified by you on cross-examination?”)

Mr. Pentz: Will you repeat his last question?

(Thereupon, the following question was [218] read by the reporter:

“Will you state, please, to the best of your present recollection, what was said, if anything, concerning the question of whether or not the AP5's under discussion were to be considered as in the combat category?”)

Mr. Pentz: I object to the question on the ground that it assumes something was said upon the subject in question, which factor has been preserved in this record due to a voluntary statement made by Mr. Wanless unresponsive to any question propounded to him by me, and I further object to it on the ground that it calls for a conclusion. That is my objection.

(Deposition of Ivan Joyce Wanless.)

Mr. Walkup: You may answer subject to the objection.

The Witness: May I ask for a reading of the question again, please?

(Thereupon, the following question was read by the reporter:

“Will you state, please, to the best of your present recollection, what was said, if anything, concerning the question of whether or not the AP5’s under discussion were to be considered as in the combat category?”)

A. They were stated to be not in the combat category, and that the rules of the American Bureau of Shipping and insofar as possible the requirements of U. S. Coast Guard [219] for cargo vessels were to be followed, which would not be the case if they were combatant ships.

Q. (By Mr. Walkup): By whom was that said?

Mr. Pentz: I wish to make the same objection as I did to the last question, as follows:

“I object to the question on the ground that it assumes something was said upon the subject in question, which factor has been preserved in this record due to a voluntary statement made by Mr. Wanless unresponsive to any question propounded to him by me, and I further object to it on the ground that it calls for a conclusion,”

and I would also like to have his answer repeated to the last question.

(Deposition of Ivan Joyce Wanless.)

(Thereupon, the answer of the witness was read as follows:

“They were stated to be not in the combat category, and that the rules of the American Bureau of Shipping and insofar as possible the requirements of U. S. Coast Guard for cargo vessels were to be followed, which would not be the case if they were combatant ships.”)

Mr. Walkup: Would you read my last question to which objection was registered? [220]

(Thereupon, the following question was read by the reporter:

“Q. By whom was that said?”)

A. That was the directive that Admiral Vickery gave to Mr. Bates and to the rest of the staff, including myself.

Q. (By Mr. Walkup): What, if any, discussion was there on that subject between the representatives of the Navy and the representatives of the Maritime Commission at the meeting?

Mr. Pentz: I wish to have my same objection registered, as follows:

“I object to the question on the ground that it assumes something was said upon the subject in question, which factor has been preserved in this record due to a voluntary statement made by Mr. Wanless unresponsive to any question propounded to him by me, and I further object to it on the ground that it calls for a conclusion.”

A. The matter was discussed at some length and

(Deposition of Ivan Joyce Wanless.)

the Navy acquiesced in that decision because of the necessity of obtaining the vessels at certain specified dates stipulated by The Joint Chiefs of Staff.

Mr. Pentz: I move to strike the entire answer as embracing Mr. Wanless' interpretation of such a conversation, if one did exist, and comprising conclusions. [221]

Let me hear the answer read back as I may want to enlarge upon my statement.

(Thereupon, the following answer was read by the reporter:

"The matter was discussed at some length and the Navy acquiesced in that decision because of the necessity of obtaining the vessels at certain specified dates stipulated by The Joint Chiefs of Staff.")

Mr. Penz: That is the end of my statement, then.

Q. (By Mr. Walkup): Mr. Wanless, I would like to state that frequently witnesses in describing a conversation state the conclusion rather than the fact. In other words, it is improper to state "they agreed" or something of that nature, from a technical legal standpoint.

What I am asking you to do, and I am making this statement so it will avoid asking it several times, is to state to the best of your present recollection what was said by the representatives of the Navy and what reply was made by the representatives of the Maritime Commission in the conversation in question, realizing, of course, that you will

(Deposition of Ivan Joyce Wanless.)

probably not have a verbatim memory at this time of what was actually said, but asking you to give your best present recollection of the conversations at this time.

Mr. Pentz: I object to the question. [222]

Mr. Walkup: That was not a question; that was a statement. I am now going to propound a question.

Mr. Pentz: Very well.

Q. (By Mr. Walkup): Referring again to the conversation under discussion, would you please state to the best of your present recollection what was said by the representatives of the Navy Department and the representatives of the Maritime Commission on the subject now under discussion?

Mr. Pentz: I object to that question as it has been already asked and answered and it has been already objected to.

I further object to the question because the subject matter to which it is addressed arose from a voluntary statement made by Mr. Wanless not in response to any question propounded by myself, and further on the ground it calls for a conclusion.

Mr. Walkup: You may answer subject to the objection.

A. Admiral Vickery told the Navy representatives that we would undertake the conversion on the ground that I previously mentioned, which grounds were determined after discussion by Admiral Vickery and the staff present ahead of time.

The Navy protested and desired certain changes,

(Deposition of Ivan Joyce Wanless.)

which I have previously stated the Commission would not agree to, and as previously stated, they acquiesced in order to receive delivery of the vessels. The confirming letter is in the file [223] and I can get it.

Mr. Pentz: I move to strike every part of the answer given by Mr. Wanless on the ground it constitutes his conclusion and interpretation of the conversation, if any such existed, and I further move that it be stricken on the ground that by his own admission in his answer he has indicated that his statements cannot be the best evidence in that there is correspondence existing bearing upon the subject.

Q. (By Mr. Walkup): Mr. Wanless, referring again to the conversation in question, and so as to meet objection which has been registered, I will ask you to please state if you can, to the best of your present recollection, what was said at the meeting in question by representatives of the Navy Department, and what was said by representatives of the Maritime Commission on the subject in question?

Mr. Pentz: I object to the question on the ground that it has at least twice and perhaps more been asked and answered, and on the further ground that the subject matter to which it is addressed was one resulting from a voluntary statement by Mr. Wanless, not made in response to any interrogation propounded to him by myself.

(Deposition of Ivan Joyce Wanless.)

Mr. Walkup: You may answer, subject to the objection.

A. The Navy Department requested the conversion of the AP2 vessels, which was the reason the meeting was called. [224] Admiral Vickery stated that the conversion could be undertaken only by retaining commercial standards wherever possible.

The Navy Department requested acceptance of certain Navy standards, which was denied.

The orders were given that these were not to be combat vessels and that the commercial standards, again, were to be followed wherever practicable.

Mr. Pentz: I move to strike the answer on the ground it does not purport to relate conversations even in the most remote substance; that it comprises Mr. Wanless' conclusions and interpretations.

Q. (By Mr. Walkup): You stated in your answer to the previous question that Admiral Vickery made a certain statement? A. Yes, sir.

Q. What reply was made to that statement by any representative of the Navy Department?

Mr. Pentz: I object to the question on the ground it has been substantially asked and answered on a number of occasions, and it concerns a subject matter arising from a voluntary statement of a conclusion which Mr. Wanless has suggested, not in response to any question propounded to him by myself.

Mr. Walkup: Do you remember the question?

The Witness: No. [225]

(Deposition of Ivan Joyce Wanless.)

Mr. Walkup: Will you read the question?

(Thereupon, the following question was read by the reporter:

“What reply was made to that statement by any representative of the Navy Department?”)

Mr. Prentz: I further object to the question on the ground there is nothing in the record to indicate that any statement was made by anybody.

Mr. Walkup: Will you read back Mr. Wanless' answer to the previous question when he referred to a statement made by Admiral Vickery?

(Thereupon, the following answer of the witness was read by the reporter:

“The Navy Department requested the conversion of the AP2 vessels, which was the reason the meeting was called. Admiral Vickery stated that the conversion could be undertaken only by retaining commercial standards wherever possible.

“The Navy Department requested acceptance of certain Navy standards, which was denied.

“The orders were given that these were not to be combat vessels and that the commercial standards, again, were to be followed wherever practicable.”)

The Witness: Will you repeat the question?

(Thereupon, the following question was read [226] by the reporter:

“What reply was made to that statement by any representative of the Navy Department?”)

(Deposition of Ivan Joyce Wanless.)

The Witness: The Navy Department stated that they would agree to such terms and conditions in order to obtain vessels at the stipulated required dates desired by the Joint Chiefs of Staff.

Mr. Pentz: I move to strike that answer on the ground it does not purport to relate a statement, but, on the other hand, is Mr. Wanless' conclusion.

Q. (By Mr. Walkup): Do you recall who made the statement on behalf of the Navy Department?
A. The Admiral.

Q. And have you told us to the best——

Mr. Pentz: Wait a minute. I am sorry I have to have the opportunity to make the same objection to each of these questions as they proceed and I failed to have the opportunity in that last instance.

Will you read to me the question I didn't have an opportunity to object to?

(Thereupon, the last question was read by the reporter, as follows:

“Do you recall who made the statement on behalf of the Navy Department?”) [227]

Mr. Pentz: My objection to that question is, first, there is no evidence that any statement was made. If any there was it is designed to cover a subject matter which was gratuitously and voluntarily offered us by Mr. Wanless, not in response to any question propounded by me.

Is there a question pending now?

Mr. Walkup: I believe I started a question and you asked for the privilege to object, before I completed the question.

(Deposition of Ivan Joyce Wanless.)

Mr. Pentz: That being the case, perhaps you would care to reframe it, or continue, as you choose.

Q. (By Mr. Walkup): Have you told us to the best of your present recollection what was said by the Navy Admiral in response to the statement of Admiral Vickery, of the Maritime Commission, to which you have previously testified?

Mr. Pentz: I object to the question on the ground it has been substantially asked and answered a number of times, which now has grown to a point that I do not recall the number, and that it is designed to cover a subject matter voluntarily inserted by Mr. Wanless, not in response to any question propounded by myself.

Mr. Walkup: You may answer.

A. I have.

Q. (By Mr. Walkup): Mr. Wanless, you mentioned in your testimony some [228] difference between standards of the American Bureau of Ship Building and the Navy standards. Could you state in further explanation of that testimony the basic differences?

Mr. Pentz: Just a minute. Insofar as that question is designed, if it is, to refer to the subject matter covered by my previous objections, I object on the ground that it pertains to a subject matter voluntarily and gratuitously offered, not being in response to any interrogation propounded to Mr. Wanless by myself. Otherwise, I have no objection.

(Deposition of Ivan Joyce Wanless.)

Mr. Walkup: You may answer, subject to the objection.

A. The American Bureau of Shipping rules are promulgated to safeguard the insurance companies and designed to give vessels——

Mr. Pentz: Just a minute. Let me hear that question back again.

(Thereupon, the following question was read by the reporter:

“Mr. Wanless, you mentioned in your testimony some difference between standards of the American Bureau of Ship Building and the Navy standards. Could you state in further explanation of that testimony the basic difference?”)

Mr. Pentz: I object to that question on the ground it does not indicate any common factors upon which any comparison can be made of anything, and for that reason it is ambiguous [229] and uncertain.

Mr. Walkup: I will withdraw the question, in view of the objection.

Q. (By Mr. Walkup): I will ask the witness merely whether the——

Mr. Pentz: Excuse me; I further wish the record to show that in connection with the formation of this question Mr. Wanless has engaged in a whispered conversation of short duration with Mr. Walkup.

(Deposition of Ivan Joyce Wanless.)

Mr. Walkup: On that point I would like to state that the witness said to me that I had incorrectly described the American Bureau of Ship Building and that it should be the American Bureau of Shipping, and I believe the remark was directed also to the reporter's attention; was that correct?

The Witness: Yes; the remark was directed to the reporter. There is no such institution as the American Bureau of Ship Building.

Mr. Walkup: I was in error on that point.

Q. (By Mr. Walkup): I will now ask you, Mr. Wanless, if there is an American Bureau of Shipping? A. There is.

Q. And does the American Bureau of Shipping have a set of shipbuilding standards?

A. It does. [230]

Q. Do those standards to your knowledge differ in any material respects from the standards of the United States Navy shipbuilding standards?

A. They do.

Mr. Pentz: Just a minute. Will you stipulate that the answer may be stricken until I have the opportunity to object?

Mr. Walkup: Yes. It is my understanding that objections to the form of questions are reserved until the time of trial.

Mr. Pentz: I think you are correct. I object to that question on the basis that it calls for a conclusion of the witness in that it is obvious that if there is any distinction or difference at all between the two standards, the standards or rules themselves

(Deposition of Ivan Joyce Wanless.)

will furnish the best evidence of any such difference.

Mr. Walkup: You may answer the question. Would you read the question back?

(Thereupon, the following question was read by the reporter:

“Do those standards to your knowledge differ in any material respects from the standards of the United States Navy shipbuilding standards?

“Answer: They do.”)

Mr. Pentz: May I ask a question on voir dire, please?

Mr. Walkup: Please.

Mr. Pentz: These two standards you are speaking about [231] are compiled in written form, are they not, Mr. Wanless?

The Witness: The American Bureau is. The Navy is not, as I can explain.

Mr. Pentz: Therefore, I renew my objection to the question on the basis that whatever the rules are that are in writing furnish the best evidence for any comparison, and that Mr. Wanless' testimony by its response to this question will constitute his conclusion.

Mr. Walkup: I believe the question does not call for a comparison; merely a question as to whether or not differences exist.

You may answer the question, subject to the objection.

(Deposition of Ivan Joyce Wanless.)

The Witness: May I have the question read?

(Thereupon, the following question was read by the reporter:

“Question: Do those standards to your knowledge differ in any material respects from the standards of the United States Navy ship-building standards?”)

The Witness: The American Bureau rules are promulgated for the construction of cargo vessels, passenger vessels, and other merchant types and are codified and simplified so that most Naval Architects can determine the strength requirements, thickness of the plating, et cetera, according to the principal dimensions of the vessel.

The Navy standards, so-called, are a detailed calculation [232] of each and every member of the vessel in order to give requisite strength and the minimum weight.

This requirement of minimum weight also does not incorporate any corrosion factors which are placed in merchant vessels to allow for deterioration as said vessels are designed for a twenty-year life.

This results in a saving in structure of approximately 20 to 25 per cent should Navy standards be used in a design.

Mr. Pentz: I move to strike the answer on the ground that the purport of the answer depends upon a compilation of rules contained in a written form, and that, therefore, they themselves become

(Deposition of Ivan Joyce Wanless.)

the best evidence upon which to base any comparison; and that, therefore, Mr. Wanless' testimony comprises his own conclusions.

Q. (By Mr. Walkup): Mr. Wanless, on April 22, 1943, had the design AP5, and I refer now to the complete Maritime Commission designation VC2-S-AP5, been adopted by the Maritime Commission?

Mr. Pentz: I object to the question on the basis of the use of the word "adopted" in the sense that it calls for Mr. Wanless' conclusion.

Q. (By Mr. Walkup): To meet the objection, I will ask you if on April 22, 1943, the Maritime Commission symbol VC2-S-AP5 had been created and adopted by the Commission? [233]

Mr. Pentz: The same objection to it as I have to the former question.

Mr. Walkup: You may answer.

A. There was no AP5, that is, VC2-S-AP5 design in existence on April 22, 1943.

Mr. Walkup: I have no further questions.

Mr. Pentz: No questions.

Mr. Walkup: Mr. Notary, will you please instruct the witness that he may be dismissed and his attendance is no longer required in these proceedings?

The Notary Public: Very well. At 5:15 p.m., the witness was excused sine die.

/s/ IVAN J. WANLESS.

District of Columbia,
City of Washington—ss.

I, John P. Labofish, a Notary Public within and for the District of Columbia, do hereby certify:

That prior to being examined the witness whose signature is affixed to the foregoing deposition was sworn by me to testify the truth, the whole truth and nothing but the truth;

That said deposition was taken down by Chloe S. MacReynolds, an official court reporter of the District Court of the United States for the District of Columbia, in shorthand, [234] at the time and place therein stated and was thereafter reduced to typewriting under her direction;

That Chloe S. MacReynolds, the Reporter, is a distinterested party to the cause;

That when reduced to typewriting the deposition was read by or to the said witness, who was duly informed by me of the right to make such corrections as might be necessary to render the same true and correct, and the same was thereupon signed by the said witness in my presence.

I further certify that I am not of counsel or attorney for either of the parties hereto or in any way interested in the event of this cause, and that I am not related to either of the parties thereto.

Witness my hand and seal this 28th day of November, 1947.

[Seal] /s/ JOHN P. LABOFISH,

Notary Public Within and for
the District of Columbia.

My commission expires Dec. 14, 1947.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case and that they constitute the Record on Appeal herein, as designated by the Appellants, to wit:

Complaint for Damages for Breach of Contract, for Goods and Services, and Against Principal and Surety Upon Contract Performance Bond, Contains Exhibits A, B, C, D, E, F, G & H.

Answer of John Urquhart Birnie and Massachusetts Bonding and Insurance Company, a Corporation, Contains Exhibit A and Appendix "A."

First Amended Complaint for Payment of Money Due and Against Principal and Surety Upon Contract Performance Bond.

Answer to First Amended Complaint, Cross-Complaint and Counterclaim of John Urquhart Birnie and Massachusetts Bonding and Insurance Company, a Corporation, Contains Exhibit "A" and Appendix "A."

Answer of The Permanente Metals Corporation, a Corporation, to Counter Claim and Cross-Complaint of John Urquhart Birnie, an Individual Doing Business as Birnie Electric Company, and Massachusetts Bonding and Insurance Company, a Corporation.

Answer of Cross-Defendant United States Maritime Commission to Counter-Claim and Cross-Complaint of John Urquhart Birnie.

Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Cost Bond on Appeal.

Designation of Contents of Record on Appeal.

Concise Statement of Points on Which Defendant, Cross-Complainant and Appellant John Urquhart Birnie, an Individual Doing Business as Birnie Electric Company, Intends to Rely on Appeal.

Concise Statement of Points on Which Defendant, Cross-Complainant and Appellant Massachusetts Bonding and Insurance Company, a Corporation, Intends to Rely on Appeal.

Reporter's Transcript for February 21 and 23, 1950.

Plaintiffs' Exhibits Nos. A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S,

T—Marked HH in Wanless Deposition,

U—Marked V in Maher Deposition,

V—Marked W in Maher Deposition,

W—Marked X in Maher Deposition,

X—Marked Y in Maher Deposition,

Y—Marked Z in Maher Deposition,

Z—Marked AA in Maher Deposition,

AA—Marked BB in Maher Deposition,

BB—Marked CC in Maher Deposition,

CC—Marked DD in Maher Deposition,

DD—Marked EE in Maher Deposition.

EE—Marked GG in Maher Deposition,
FF,
GG—Marked G in McDonald Deposition,
HH—Marked P in McDonald Deposition,
II—Marked S in McDonald Deposition,
JJ—Marked 6 in McShane Deposition,
KK—Marked C in McDonald Deposition,
LL—Marked 7 in McShane Deposition,
MM—Marked D in McDonald Deposition,
NN—Marked A in McDonald Deposition,
OO—Marked B in McDonald Deposition,
PP—Marked K in McDonald Deposition,
QQ—Marked L in McDonald Deposition,
RR—Marked T in McDonald Deposition.

Defendants' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.

Depositions on Behalf of Plaintiff and Cross-Defendant, The Permanente Metals Corporation, a Corporation—Depositions of John Bassette Maher, R. L. McDonald and Ivan Joyce Wanless.

Deposition of Ralph Edward McShane, etc.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 9th day of December, A. D. 1950.

[Seal]

C. W. CALBREATH,
Clerk,

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENT
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in the above-entitled case, and that they constitute the supplement to the Record on Appeal herein, as designated by the Appellee, to wit:

Appellee's Designation of Contents of Record on Appeal.

Reporter's Transcript of Pre-Trial Conference, for January 4, 1949.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 27th day of December, A. D. 1950.

[Seal]

C. W. CALBREATH,
Clerk,

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12766. United States Court of Appeals for the Ninth Circuit. John Urquhart Birnie, an Individual Doing Business as Birnie Electric Company and Massachusetts Bonding and Insurance Company, a Corporation, Appellants, vs. The Permanente Metals Corporation, a Corporation, and United States Maritime Commission, Appellees. Transcript of Record. Appeal from the United

States District Court for the Northern District of California, Southern Division.

Filed December 11, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12766

JOHN URQUHART BIRNIE, an Individual Doing Business as BIRNIE ELECTRIC COMPANY, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corporation,

Appellants,

vs.

THE PERMANENTE METALS CORPORATION, a Corporation,

Appellee.

JOHN URQUHART BIRNIE, an Individual Doing Business as BIRNIE ELECTRIC COMPANY, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corporation,

Appellants,

vs.

THE PERMANENTE METALS CORPORATION, a Corporation; UNITED STATES MARITIME COMMISSION, and JOSEPH

K. CARSON, RAYMOND S. McKEOUGH,
ADMIRAL WILLIAM W. SMITH, GRAN-
VILLE MELLON and RICHARD PARK-
HURST, as Members of UNITED STATES
MARITIME COMMISSION,

Appellees.

STIPULATION AND ORDER RE
PRINTING OF DOCUMENTARY EXHIBITS

It Is Hereby Stipulated and Agreed by and be-
tween the parties hereto, with the approval of this
Honorable Court, that the documentary exhibits in-
cluded in the record of this appeal, be printed or
reproduced in a book of exhibits and that fifteen
(15) copies of said book of exhibits be prepared.

HILL, FARRER & BURRILL,
CRIDER, RUNKLE & TILSON,
MELLIN, HANSCOM &
HURSH,

/s/ JACK E. HURSH,
Attorneys for Appellant.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ MAX THELEN,
/s/ BRUCE WALKUP,
Attorneys for Appellee.

ORDER

The foregoing stipulation is hereby approved and it is so ordered.

Dated: January 4, 1951.

/s/ WILLIAM DENMAN,
Chief Judge,
U. S. Court of Appeals.

/s/ WM. E. ORR,
/s/ WALTER L. POPE,
Judges.

[Endorsed]: Filed Jan. 5, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION ON APPEAL UNDER RULE
19 OF THE RULES OF PRACTICE OF
THE COURT OF APPEALS FOR THE
NINTH CIRCUIT

Now, Come John Urquhart Birnie, an individual doing business as Birnie Electric Company and Massachusetts Bonding and Insurance Company, a corporation, appellants herein, and hereby adopt the Designation of Contents of Record on Appeal, filed in the District Court and already a part of the record on appeal herein as their Designation on Appeal of the record to be printed, and further designate that all of the documentary exhibits on file herein be either reproduced or printed in the book of exhibits.

CRIDER, RUNKLE & TILSON,
HILL, FARRER & BURRILL,
MELLIN, HANSCOM &
HURSH,

/s/ JACK E. HURSH,

Attorneys for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 29, 1950.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS ON
WHICH APPELLANT INTENDS TO RELY

Now, Comes Appellant Massachusetts Bonding and Insurance Company, a corporation, and adopts the Concise Statement of Points on Which Defendant-Cross-Complainant and Appellant Massachusetts Bonding and Insurance Company, a Corporation, Intends to Rely on Appeal, filed in the District Court and already appearing as a part of the record on appeal herein as the Concise Statement of Points on Which It Intends to Rely on This Appeal.

/s/ CRIDER, RUNKLE & TILSON,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 29, 1950.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS ON
WHICH APPELLANT INTENDS TO RELY

Now, Comes Appellant John Urquhart Birnie, an individual doing business as Birnie Electric Company, and adopts the Concise Statement of Points on Which Defendant-Cross-Complainant and Appellant John Urquhart Birnie, an Individual Doing Business as Birnie Electric Company, Intends to Rely on Appeal, filed in the District Court

and already appearing as a part of the record on appeal herein as the Concise Statement of Points on Which He Intends to Rely on this Appeal.

HILL, FARRER & BURRILL,
MELLIN, HANSCOM &
HURSH,

/s/ JACK E. HURSH,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 29, 1950.

[Title of Court of Appeals and Cause.]

STIPULATION SHORTENING CONTENTS
OF PRINTED BOOK OF EXHIBITS

This Stipulation is entered into by and between all of the parties to this proceeding through their respective counsel as follows:

John Urquhart Birnie, an individual, doing business as Birnie Electric Company, Appellant, through his attorneys, Hill, Farrer & Burrill, formerly Hill, Morgan & Farrer, by Elliott H. Pentz;

Massachusetts Bonding and Insurance Company, a corporation, Appellant, through its attorneys, Crider, Runkle & Tilson, by Clarence B. Runkle;

The Permanente Metals Corporation, a corporation, Appellee, through Bruce Walkup, Willis S. Slusser, Thelen, Marrin, Johnson & Bridges, by Bruce Walkup; and

United States Maritime Commission, and Joseph K. Carson, Raymond S. McKeough, Admiral William W. Smith, Granville Mellon and Richard Parkhurst, as members of United States Maritime Commission, Appellees, through their counsel, United States Attorney, Frank J. Hennessy.

It Is Hereby Stipulated and Agreed by each and all of the parties aforesaid that the documentary evidence, exhibits and portions and excerpts therefrom as are hereinafter specified, comprise the only documentary evidence, exhibits and portions and excerpts therefrom as need be printed in the printed exhibit book in the appellate records and files of this case; it being the agreement and understanding of the parties hereto that such written documentary evidence, exhibits and portions and excerpts as are not herein specified (and hence need not be printed in said printed exhibit book) shall nevertheless be deemed for all purposes as a part of the record on appeal as fully and completely as though the same were printed in said printed exhibit book, and that the entire contents of the record on appeal in this proceeding as has heretofore been specified and designated in writing by appellants and appellees, be and remain as the record on appeal herein.

Exhibits Specified for Printing in Printed Exhibit Book

(The number and letter designators hereinafter used refer to the designators adopted by the District Court of the United States, for the Southern Division of California, Northern District, at the time of the trial of this action.)

1. Plaintiff's Exhibit B.
2. Plaintiff's Exhibit C.
3. Plaintiff's Exhibit M.
4. Plaintiff's Exhibit T.
5. Plaintiff's Exhibit DD.
6. Plaintiff's Exhibit EE.
7. Plaintiff's Exhibit FF.
8. Plaintiff's Exhibit GG.
9. Plaintiff's Exhibit II.

10. Plaintiff's Exhibit KK. As to this exhibit, it is agreed that it will only be necessary to print the memorandum and attachments A and B thereto. It is further agreed that it will not be necessary to print the proposed letter and attachments A, B, C and D thereto referred to in the memorandum, as the proposed letter referred to in the memorandum was actually sent and is included in this record on appeal as Plaintiff's Exhibit LL, dated November 14, 1945. It is further agreed that a notation to this effect should be included following the printing of the portion of Plaintiff's Exhibit KK, which is included in the printed book of exhibits.

11. Plaintiff's Exhibit LL. It is agreed that it will not be necessary to print the attachments to the letter, consisting of attachments A, B, C and D, but only the letter itself.

12. Plaintiff's Exhibit MM. It is agreed that it will only be necessary to print the memorandum, and that it will not be necessary to print attachments designated as Exhibits A and B to the memorandum. It is also agreed that it will not be necessary to print the proposed letter referred to in

the memorandum as this letter was sent and is included in the record on appeal as Defendant's Exhibit 9. It is further agreed that a notation should be made in the printed book of exhibits to that effect following the printing of the memorandum.

13. Plaintiff's Exhibit NN.
14. Plaintiff's Exhibit OO.
15. Defendant's Exhibit 1.
16. Defendant's Exhibit 2.
17. Defendant's Exhibit 3.
18. Defendant's Exhibit 4.
19. Defendant's Exhibit 5.
20. Defendant's Exhibit 6.
21. Defendant's Exhibit 7.
22. Defendant's Exhibit 8.
23. Defendant's Exhibit 9.
24. Defendant's Exhibit 10.
25. Defendant's Exhibit 11.
26. Defendant's Exhibit 12.
27. Defendant's Exhibit 13.

Any exhibits or portions or excerpts therefrom as are not specified herein for printing in the aforesaid printed Exhibit Book shall be available in their original form to the Court at the request of any party hereto, that reference thereto may be made in the briefs to any such exhibit, whether printed or not, and that the Court may, if it so desires, refer to all exhibits and portions and excerpts therefrom as are not printed, or any part or por-

tion thereof for such examination and consideration as to the Court may seem desirable.

Dated this 21st day of February, 1951.

HILL, FARRER & BURRILL, Formerly HILL,
MORGAN & FARRER,

By /s/ ELLIOTT H. PENTZ,

Attorneys for John Urquhart Birnie, an Individual,
d.b.a. Birnie Electric Company, Appellant.

CRIDER, RUNKLE & TILSON,

By /s/ CLARENCE B. RUNKLE,

Attorneys for Massachusetts Bonding and Insurance Company, a Corporation, Appellant.

BRUCE WALKUP,

WILLIS S. SLUSSER,

THELEN, MARRIN, JOHNSON
& BRIDGES,

By /s/ BRUCE WALKUP,

Attorneys for The Permanente Metals Corporation,
a Corporation, Appellee.

/s/ FRANK J. HENNESSY,

United States Attorney, Attorney for United States Maritime Commission, and Joseph K. Carson, Raymond S. McKeough, Admiral William W. Smith, Granville Mellon and Richard Parkhurst, as Members of United States Maritime Commission, Appellees.

ORDER

Approved and It Is So Ordered this 21st day of February, 1951.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WM. E. ORR,
/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Feb. 23, 1951.

[Title of Court of Appeals and Cause.]

SUPPLEMENT TO STIPULATION SHORTENING
CONTENTS OF PRINTED BOOK
OF EXHIBITS

As a Supplement to Stipulation Shortening Contents of Printed Book of Exhibits, all of the parties to this proceeding through their respective counsel, hereinafter designated, agree as follows:

John Urquhart Birnie, an individual, doing business as Birnie Electric Company, Appellant, through his attorneys, Hill, Farrer & Burrill, formerly Hill, Morgan & Farrer, by Elliott H. Pentz;

Massachusetts Bonding and Insurance Company, a corporation, Appellant, through its attorneys, Crider, Runkle & Tilson, by Clarence B. Runkle;

The Permanente Metals Corporation, a corporation, Appellee, through Bruce Walkup, Willis S.

Slusser, Thelen, Marin, Johnson & Bridges, by Bruce Walkup; and

United States Maritime Commission, and Joseph K. Carson, Raymond S. McKeough, Admiral William W. Smith, Granville Mellon and Richard Parkhurst, as members of United States Maritime Commission, Appellees, through their counsel, United States Attorney, Frank J. Hennessy.

It Is Further Stipulated and Agreed by each and all of the parties aforesaid that no official certification of the United States Maritime Commission or the United States Navy, as may be attached to any of the exhibits in the record of this case certifying to the official character of any such exhibits by said governmental agencies, need be reproduced or printed in full, but that in lieu thereof it will be sufficient that the book of exhibits merely bear the notation in each such instance indicating that the document or exhibit in question was certified by the United States Maritime Commission or the United States Navy, as the case may be.

Dated this 21st day of February, 1951.

HILL, FARRER & BURRILL, Formerly, HILL,
MORGAN & FARRER,

By /s/ ELLIOTT H. PENTZ,

Attorneys for John Urquhart
Birnie, Appellant.

CRIDER, RUNKLE & TILSON,

By /s/ CLARENCE B. RUNKLE,

Attorneys for Massachusetts Bonding and Insurance Company, a Corporation, Appellant.

BRUCE WALKUP,
WILLIS S. SLUSSER,
THELEN, MARRIN, JOHNSON
& BRIDGES,

By /s/ BRUCE WALKUP,
Attorneys for the Permanente Metals Corporation,
a Corporation, Appellee.

/s/ FRANK J. HENNESSY,
United States Attorney, Attorney for United States
Maritime Commission, and Joseph K. Carson,
Raymond S. McKeough, Admiral William W.
Smith, Granville Mellon and Richard Park-
hurst, as Members of United States Maritime
Commission, Appellees.

ORDER

Approved and It Is So Ordered this 21st day of
February, 1951.

/s/ WILLIAM DENMAN,
/s/ WM. E. ORR,
/s/ WALTER L. POPE,
Judges, U. S. Court of Appeals for the Ninth Cir-
cuit.

[Endorsed]: Filed Feb. 23, 1951.

No. 12766

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN URQUHART BIRNIE, an individual doing business as
BIRNIE ELECTRIC COMPANY, and MASSACHUSETTS
BONDING AND INSURANCE COMPANY, a corporation,
Appellants,

vs.

THE PERMANENTE METALS CORPORATION, a corporation,
and UNITED STATES MARITIME COMMISSION,
Appellees.

Opening Brief on Behalf of Appellant John Urquhart
Birnie, an Individual Doing Business as Birnie
Electric Company.

HILL, FARRER & BURRILL,
ELLIOTT H. PENTZ,
411 West Fifth Street,
Los Angeles 13, California,
Attorneys for Appellant John Urquhart Birnie.

TOPICAL INDEX

	PAGE
Jurisdiction	1
Concise abstract of case and questions involved.....	3
Specification of errors.....	6
Argument	9

I.

Special Provision 4 of Subcontract VS-14.....	9
---	---

II.

The effect of Section 401 of Title IV of the Second Revenue Act of 1940 (34 U. S. C. A. 496a) is to suspend the profit limiting provisions of the Vinson-Trammell Act relating to construction of naval vessels or portions thereof.....	10
--	----

III.

VS-14 was entered into in a year to which the excess profits tax was applicable.....	13
--	----

IV.

VS-14 was a subcontract for the construction or manufacture of a portion of a complete vessel.....	13
--	----

V.

The undisputed evidence showed these 22 vessels covered by VS-14 were naval vessels because of (a) The events leading up to their actual use by the Navy; (b) The nature of their actual use by the Navy; and (c) Their physical characteristics	15
--	----

VI.

Quite aside from the events leading up to their actual use by the Navy and their physical characteristics, undisputed evidence showed that these vessels were constructed by the Commission for the intended ultimate use of the Navy pursuant to letter arrangement between the two agencies and because of this intended ultimate use by the Navy, they are naval vessels as a matter of law.....	17
---	----

VII.

Regulation of so-called excess profits from the construction of naval vessels during the period of the excess profits tax was required by the unequivocal terms of Section 401, to be carried out only under the provisions of the Internal Revenue Code	21
--	----

VIII.

Unrealistic stress upon technicalities must be adopted in order to conclude that Subcontract VS-14 is not a subcontract falling within the provisions of Section 401 of the Revenue Act of 1940.....	26
Conclusion	35

INDEX TO APPENDICES

Appendix "A." Public Law 5: Joint Resolution of February 6, 1941 (55 Stat. 5, 46 U. S. C. A. 1119a, b, 1125a).....	1
Appendix "B." Public Law 247: First Supplemental National Defense Appropriation (55 Stat. 669 at 681).....	4
Appendix "C." Public Law 630: Independent Offices Appropriation (56 Stat. 392 at 418).....	7

TABLE OF AUTHORITIES CITED

CASES	PAGE
Commissioner of Internal Revenue v. Aluminum Co. of America, 142 F. 2d 663; cert. den. 323 U. S. 728, 89 L. Ed. 585.....	15, 21
Federal Trade Commission v. Raladam Co., 283 U. S. 643, 75 L. Ed. 1324.....	25
ibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396, 32 L. Ed. 979.....	25
Northern Pacific Railway Company v. United States of America, 330 U. S. 248, 91 L. Ed. 876.....	18, 28, 29
Pacific Electric Railway Co. v. Commonwealth Bonding & Casualty Ins. Co., 55 Cal. App. 704, 204 Pac. 262.....	26
Pressed Steel Tank Co. v. Commissioner of Internal Revenue, 133 F. 2d 776; aff'ing 46 B. T. A. 52.....	14, 21
Southern Pacific Company v. Defense Supplies Corp., 64 Fed. Supp. 607	28, 29
Southern Pacific Company v. Reconstruction Finance Corpora- tion, 161 F. 2d 56.....	29
Standard Oil Co. of New Jersey et al. v. United States, 211 U. S. 1, 55 L. Ed. 619.....	25
United States v. Trans-Missouri Freight Association, 166 U. S. 290, 41 L. Ed. 1007.....	25

MISCELLANEOUS

House Report No. 2894 (Aug. 28, 1940, 76th Cong.), Cum. Bull. 1940-2, p. 496.....	24
--	----

STATUTES

Act of March 26, 1934 (48 Stat. 503, 34 U. S. C. A. 496).....	7, 12, 28
Act of March 27, 1934 (48 Stat. 503, U. S. C. 494, 495, 497)....	12
Act of November 8, 1945 (59 Stat. 568).....	13
Judicial Code, Sec. 1291.....	1

Judicial Code, Sec. 1332.....	2
Merchant Marine Act of 1936 (46 U. S. C. A. 1101, Subchap. 5)	30
Merchant Marine Act of 1936 (46 U. S. C. A. 1151-61).....	30
Merchant Marine Act of 1936, Sec. 4 (46 U. S. C. A. 1125a)....	31
Merchant Marine Act of 1936, Sec. 207 (46 U. S. C. A. 1117)..	31
Public Law 5 (55 Stat. 5, 46 U. S. C. A. 1119a).....	30, 31
Public Law 5, Sec. 2.....	31
Public Law 5, Sec. 4.....	31
Public Law 5, Subsec. 1.....	31
Public Law 5, Subsec. 2 (46 U. S. C. A. 1119b).....	31
Public Law 247 (First Supplemental National Defense Approp- riation Act of 1942, 55 Stat. 669).....	30, 31, 32
Public Law 630 (Independent Offices Appropriation Act of 1943, 56 Stat. 392).....	30, 32
Second Revenue Act of 1940, Title IV, Sec. 401 (54 Stat. 1003, 34 U. S. C. A. 496(a)).....	7, 9, 10, 11, 12, 13, 21, 22, 25, 34, 35
United States Code Annotated, Title 28, Sec. 1291.....	1
United States Code Annotated, Title 28, Sec. 1332.....	2
United States Code Annotated, Title 50, App., Sec. 1152.....	28
Vinson-Trammell Act (46 U. S. C. A. 1155b).....	27
Vinson-Trammell Act (53 Stat. 555, 10 U. S. C. A. 311).....	27
Vinson-Trammell Act, Sec. 3.....	10
War and Defense Contract Act of June 28, 1940 (54 Stat. 676)	27

No. 12766

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN URQUHART BIRNIE, an individual doing business as
BIRNIE ELECTRIC COMPANY, and MASSACHUSETTS
BONDING AND INSURANCE COMPANY, a corporation,

Appellants,

vs.

THE PERMANENTE METALS CORPORATION, a corporation,
and UNITED STATES MARITIME COMMISSION,

Appellees.

Opening Brief on Behalf of Appellant John Urquhart
Birnie, an Individual Doing Business as Birnie
Electric Company.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1291 of the Judicial Code (28 U. S. C. A., Sec. 1291). The original suit is an action where the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs and is between citizens of different states, of which the District Court had jurisdiction under Section

1332 of the Judicial Code (28 U. S. C. A., Sec. 1332). The issues between these parties were framed by the first amended complaint of plaintiff, The Permanente Metals Corporation, against John Urquhart Birnie and Massachusetts Bonding and Insurance Company [R. 89]; the answer to first amended complaint of plaintiff filed by defendants John Urquhart Birnie and Massachusetts Bonding and Insurance Company, together with a cross-complaint and counterclaim against The Permanente Metals Corporation and United States Maritime Commission (including the individual members thereof) [R. 101], and the answer of The Permanente Metals Corporation to the aforesaid counterclaim and cross-complaint [R. 129], together with the answer of United States Maritime Commission to the aforesaid counterclaim and cross-complaint¹ [R. 141].

¹Throughout this brief the defendants below and appellants in this court, John Urquhart Birnie and Massachusetts Bonding and Insurance Company will be referred to respectively as "Birnie" and "Bonding Company," and plaintiff below and appellee in this court, The Permanente Metals Corporation, will be referred to as "Permanente." Wherever necessary to refer to United States Maritime Commission it will be referred to as "Maritime Commission" and wherever necessary to refer to the United States Navy, it will be referred to as "Navy." Reference to the transcript of record will be made by reference to said record by the letter "R," followed by the number of the page referred to. All emphasis will be ours unless otherwise noted.

Concise Abstract of Case and Questions Involved.

This case involves the construction of a group of vessels for use by the United States Navy during the last war known as "APA's," which letters were designated by the Navy to stand for "Auxiliary Transport Attack."² This type of vessel performed an important service for the combatant United States Navy in its conquest of the Pacific Ocean. As an adjunct of the combatant fleet, the United States Navy desired a type of vessel with special compartmentation, armament and facilities for stowage, handling and launching of various types of amphibious craft, whereby troops with their gear and suitable amphibious vehicles could be transported at a speed consistent with that necessary to be maintained by the fleet to the shores of the enemy from whence these troops could be placed ashore ready for combat [R. 264-295]. Twenty-two of these APA vessels furnish the subject matter of this litigation. The prime contractor was Permanente who contracted in writing with the Maritime Commission to build 77 vessels bearing Maritime Commission hulls Nos. 525 to 601 inclusive, of a design known as VC-S-AP2, pursuant to Public Laws 247 and 630 (77th Congress) [R. 595]. This particular design is conceded to represent a commercial cargo carrying type of vessel. This contract will hereinafter be called "Prime Contract."

²In Navy parlance, "A" stands for "Auxiliary," "P" stands for "Transport," and "A" stands for "Attack." [R. 308.]

By Addendum No. 2 to prime contract, the Maritime Commission directed Permanente to complete 22 of these 77 vessels as *combat loaded troop ships* (Design VC2-S-AP5)³ [R. 626]. Birnie was a sub-contractor for these 22 vessels and contracted with Permanente [R. 13, 39] to install Degaussing, radar, voice tube, mechanical telegraph and mechanical wireways in and upon these 22 vessels. This subcontract, for convenience, will hereinafter be called "VS-14."

While it is conceded that the 77 vessels originally to be built under the prime contract were intended to be of a commercial cargo carrying type (Maritime Commission design VC-2-AP2), and all 77 might have been built as such in the ordinary course of events, 22 of this group of 77 vessels covered by VS-14 [R. 13] and its Addendum No. 1 [R. 39] were changed in design to fit a special naval need and actually became naval vessels. The genesis of their intended naval character occurred on November 9, 1943, when Admiral William D. Leahy, as Chief of Staff, acting for the Joint Chiefs of Staff, directed the Maritime Commission to construct 130 APA's, of which the said 22 vessels covered by VS-14 formed a part [R. 737, 340].

Following Admiral Land's directive, these contractual changes occurred:

- (a) Said Addendum No. 2 to the Prime Contract dated December 7, 1944 [R. 626 to 628] was executed memorializing the conversion of the aforesaid 22 vessels from the cargo carrying type, as they were

³In Maritime Commission parlance a ship of the design VS2-S-AP5 is commonly referred to as an "AP5." [R. 522.]

originally conceived, to the naval vessels they eventually became.

(b) Addendum No. 1 to said Contract VS-14 (Dated August 10, 1944) [R. 39] was executed likewise memorializing the conversion of the said 22 vessels to the naval vessels they eventually became.

Each party makes claim against the other as follows:

(a) Permanente claims it overpaid Birnie by \$114,258.98 after all offsets, claiming this amount by reason of Special Provision No. 4 of VS-14, which purports to limit Birnie's profit to 10% of the stated contract price. This money, if recovered, becomes the property of the Maritime Commission. Permanente makes separate claim for the sum of \$1545.66 which Birnie admits due and owing, but this claim has no bearing on the issues raised respecting Special Provision No. 4 of said subcontract VS-14.

(b) Birnie seeks to recover the stated contract price for his work. If successful he accounts for this money as an income tax to the Bureau of Internal Revenue but gains the privilege to apply against this tax such losses as he may have incurred during the appropriate taxable years. He claims Permanente owes him the sum of \$43,185.27, insisting that the 10% profit limitation of Special Provision No. 4 of VS-14 is of no force or effect. This sum is conceded to be the stated contract price of VS-14, less what Birnie has received in payment on account thereof, less the aforesaid offset of \$1545.66. Birnie has abandoned all other claim asserted in his cross-complaint [R. 223] arising from another subcontract known as VS-28, except to the extent that

Permanente admits owing Birnie the sum of \$34,-687.59 on account thereof, which amount was considered an offset item in the judgment [R. 222-223] in arriving at the above claim of \$114,258.99, and is automatically added to his claim of \$43,185.27 on VS-14 aforesaid, and therefore his claim, in the aggregate, is for \$78,872.86.

Thus each party differs as regards Special Provision No. 4 of VS-14, and the basic question involved in this appeal is whether the District Court erred in giving effect to that portion of Special Provision No. 4 of VS-14, which purports to limit Birnie's profit to ten per cent of the total contract price of VS-14. This question is solved when it is determined whether VS-14 is a subcontract for the construction of naval vessels or portions thereof within the scope and meaning of the Vinson-Trammell Act and certain other statutes pertaining thereto.

Specification of Errors.

1. The Court erred in finding that the prime contract—insofar as the 22 vessels covered by VS-14 are concerned—was not a contract for the construction and manufacture of complete naval vessels or portions thereof, in that such finding is not supported by any competent evidence.

2. The Court erred in finding that the subcontract VS-14 was not a contract or subcontract for the construction and manufacture of complete naval vessels or portions thereof, in that such finding is not supported by any competent evidence.

3. The Court erred in finding that the prime contract—insofar as the 22 vessels covered by VS-14 are con-

cerned—was a contract made by the Commission acting as an independent agency of the United States and on its own behalf in that such finding is not supported by any competent evidence.

4. The Court erred in finding that Permanente has done and performed all acts and things required on its part to be done and performed under VS-14 and the addenda thereof, in that such finding is not supported by any competent evidence.

5. The Court erred in finding that said VS-14 was not a contract made with Birnie by the Secretary of the Navy in that it is immaterial to the issues of this case whether or not said VS-14 was a contract made between Birnie and the Secretary of the Navy.

6. The Court erred in concluding as a matter of law that Special Provision No. 4 contained in VS-14 is valid and binding and that said provision was not rendered invalid or void or without effect because of Section 401 of Title IV of the Second Revenue Act of 1940 (54 Stat. 1003, 34 U. S. C. A. 496(a)).

7. The Court erred in concluding as a matter of law that said Section 401 of Title IV of the Second Revenue Act of 1940 is inapplicable to the prime contract and to VS-14 and to Special Provision No. 4.

8. The Court erred in concluding as a matter of law that the Act of March 26, 1934 (48 Stat. 503, 34 U. S. C. A. 496), was not applicable to the prime contract and to VS-14 and to Special Provision No. 4.

9. The Court erred in concluding as a matter of law that the prime contract was not a contract for the construction or manufacture of any complete naval vessel or any portions thereof within the meaning and effect of the aforesaid acts.

10. The Court erred in concluding as a matter of law that VS-14 was not a contract or subcontract for the construction or manufacture of any complete naval vessel or any portions thereof within the meaning and effect of the aforesaid acts.

11. The Court erred in concluding as a matter of law that Permanente is not obligated to pay Birnie any amount under VS-14.

12. The Court erred in concluding as a matter of law that Birnie is obligated to pay to Permanente under VS-14 the sum of \$148,946.57, or any amount.

13. The Court erred in concluding as a matter of law that Birnie is obligated to pay Permanente attorneys' fees of \$15,000.00, or any amount, under Article 29 of VS-14.

14. The Court erred in concluding as a matter of law that Birnie, as the principal, is severally liable or jointly liable with the defendant, cross-complainant and appellant Massachusetts Bonding and Insurance Company, a corporation, under any performance bonds or endorsements thereto to pay to Permanente the sum of \$114,258.98, or the sum of \$15,000.00 for attorneys' fees, or any sums whatsoever.

15. The Court erred in concluding as a matter of law that Permanente should have judgment for its costs of suit against Birnie.

16. The Court erred in concluding as a matter of law that the Commission should have judgment for its costs of suit against Birnie.

17. The Court erred in not granting the relief as prayed for in the answer of Birnie to the first amended complaint, the cross-complaint and counterclaim of Birnie to the extent of \$78,872.86, plus interest and costs of suit.

ARGUMENT.

The District Court erred in failing to hold that Section 401 of Title IV of the Revenue Act of 1940 (34 U. S. C. A. 496a) rendered Special Provision 4 of sub-contract VS-14 "without effect."

I.

Special Provision 4 of Subcontract VS-14.

In the abstract of the case statements have been made that this Special Provision No. 4 "limited Birnie's profit to ten per cent of stated contract price." The language of that part of said Special Provision No. 4 is quoted as follows:

"4. REPORT OF COST—EXCESS PROFITS: The Subcontractor agrees to account for and pay to the Contractor certain profits derived under this contract, and for such purposes agrees:

(a) * * *

(b) To pay to the Contractor profit as shall be determined by the Commission in excess of ten (10) per cent of the total contract price which amount shall become the sole property of the Commission."
[R. 18-19.]

II.

The Effect of Section 401 of Title IV of the Second Revenue Act of 1940 (34 U. S. C. A. 496a) Is to Suspend the Profit Limiting Provisions of the Vinson-Trammell Act Relating to Construction of Naval Vessels or Portions Thereof.

Said Section 496a (of 34 U. S. C. A.) provides as follows:

“The provisions of Section 496 of this title, beginning with the first proviso thereof, and section 1152(b) of Appendix to Title 50, shall not apply to contracts or subcontracts for the construction or manufacture of any complete naval vessel or any Army or Navy aircraft, or any portion thereof, which are entered into in any taxable year to which the excess profits tax provided in sub-chapter E of Chapter 2 of Title 26 is applicable or would be applicable if the contractor or subcontractor, as the case may be, were a corporation, *and any agreement to pay into the Treasury profit in excess of 10 per centum, 12 per centum, or 8 per centum, as the case may be, of the contract prices of any such contracts or subcontracts shall be without effect.* This section shall also apply to such contracts or subcontracts which were entered into before the date of the beginning of the contractor’s or subcontractor’s first taxable year which begins in 1940 and which are not completed before such date. Oct. 8, 1940, 11 p. m., E. S. T., c. 757, Title IV, Sec. 401, 54 Stat. 1003.” (Italics added.)

Section 496a suspends the profit limiting provisions of Section 496 of Title 34, U. S. Code, which is Section 3 of the Vinson-Trammell Act (also commonly known and referred to as the Vinson Act).

Section 496a was originally enacted as Section 401 of Title IV of the Second Revenue Act of 1940. The title of Section 496a as the section appears in its original form at 54 Stat. 1003 is "Suspension of profit limiting provisions of the Vinson Act."

The profit limiting provisions of Section 496 which are suspended by Section 496a are as follows:

"§496. Annual estimates; reports of contractors; limitation on profits.

"* * * Provided, that no contract shall be made by the Secretary of the Navy for the construction and/or manufacture of any complete naval vessel or aircraft, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees—

"(a) To make a report, as hereinafter described, under oath, to the Secretary of the Navy upon the completion of the contract.

"(b) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the total contract prices, for the construction and or manufacture of any complete naval vessel or portion thereof, and in excess of 12 per centum of the total contract prices for the construction and or manufacture of any complete aircraft or portion thereof of such contracts within the scope of this section as are completed by the particular contracting party within the income taxable year, such amount to become the property of the United States, * * * Provided, that if there is a net loss on all such contracts or subcontracts for the construction and or manufacture of any complete naval vessel or portion thereof completed by the particular contractor or subcontractor within any income taxable year, such net loss shall

be allowed as a credit in determining the excess profit, if any, for the next succeeding income taxable year, and that if there is a net loss, or a net profit less than 12 per centum, as aforesaid on all such contracts or subcontracts for the construction and or manufacture of any complete aircraft or portion thereof completed by the particular contractor or subcontractor within any income taxable year, such net loss or deficiency in profit shall be allowed as a credit in determining the excess profit, if any, during the next succeeding four income taxable years, and that the method of ascertaining the amount of excess profit, initially fixed upon shall be determined on or before June 30, 1939; Provided further, that if such amount is not voluntarily paid the Secretary of the Treasury shall collect the same under the usual methods employed under the Internal-Revenue laws to collect Federal income taxes: Provided further, that all provisions of law (including penalties) applicable with respect to the taxes imposed by Title I of the Revenue Act of 1934, and not inconsistent with this section, shall be applicable with respect to the assessment, collection, or payment of excess profits to the Treasury as provided by this section, and to refunds by the Treasury of overpayments of excess profits into the Treasury: And provided further, that this section shall not apply to contracts or subcontracts for scientific equipment used for communication, target detection, navigation, and fire control as may be so designated by the Secretary of the Navy: * * *

Section 496 of Title 34 was enacted in 1934 as part of the Vinson-Trammell Act (Act of March 27, 1934; 48 Stat. 503, Secs. 494, 495, 496, 497 U. S. Code) dealing with the composition of the Navy.

III.

**VS-14 Was Entered Into in a Year to Which the
Excess Profits Tax Was Applicable.**

The excess profits tax was made applicable to tax years commencing after December 31, 1939, by the Revenue Act of October 8, 1940 (54 Stat. 1003). It was repealed by the Act of November 8, 1945 (59 Stat. 568) which made the provisions of the excess profits tax inapplicable to any tax year commencing after December 31, 1945.

IV.

**VS-14 Was a Subcontract for the Construction or
Manufacture of a Portion of a Complete Vessel.**

The work done by Birnie and the equipment installed are clearly a part of a complete vessel within the meaning of the Vinson-Trammell Act. The following case holds that a subcontract to supply the initial ammunition to be placed aboard a naval vessel was a subcontract for the construction of a complete naval vessel.

“Petitioner manufactured, under written contract, shells, or torpedo heads, for new naval destroyers. Our question is whether such articles are ‘for the construction * * * of any *complete* naval vessel * * * or any portion thereof.’ If the articles are so considered, Section 3 of the Vinson Act requires the contractor to pay to the United States, all profit in excess of ten per cent of the total contract price. Petitioner argues that the torpedo heads are no part of a ‘complete naval vessel’ but are merely an independent instrumentality used in conjunction with a naval vessel. * * *

“Conceding that the question is not free from doubt our mature conclusion is that a ‘complete naval vessel’ includes the shell and torpedo heads made for said naval vessel and which were to be carried as part of its equipment.”

Pressed Steel Tank Co. v. Commissioner of Internal Revenue (C. C. A. 7th), 133 F. 2d 776 (Affirming 46 B. T. A. 52).

The following case holds that a subcontract to supply aluminum in either finished or semi-finished state which would become a part of a naval vessel was a subcontract for the construction of a complete naval vessel.

“The profit-limiting provision of Sec. 3 of the Vinson Act, which was not a part of the bill (H. R. 6604) as originally introduced, was independently offered as an amendment on the floor of the House (Vol. 78 Cong. Record, Part 2, p. 1629) and, after some discussion, was accepted by Chairman Vinson of the Naval Affairs Committee who was in charge of the bill in the House (*ib.* p. 1630). The amendment was the expression of a widely entertained desire on the part of members of Congress, oft expressed in both Houses during the passage of the bill, that excessive profits, such as had been derived from naval construction in times past, should be prevented. While there was some opposition in Congress to the bill as a whole in its authorization of extensive naval construction, we fail to find where a single voice was raised against the profit-limiting provision. Nor were any fine sights drawn by way of discrimination as to whose profits should or should not be so limited. The aim of the provision was to limit the profits on business done in connection with the naval construction provided for by the Act. * * *

“The evident legislative purpose of the provision can be effectuated fully and uniformly only if the word ‘subcontractor,’ as used therein, is construed to embrace anyone who, by contract or order, furnishes specified materials for intended and designated use in identified naval construction authorized by the Act. We think that it was the intent of Congress that the terms ‘subcontract’ or ‘subcontractor,’ as used in the Vinson Act, should be so construed.”

Commissioner of Internal Revenue v. Aluminum Co. of America (C. C. A. 3rd), 142 F. 2d 663 (cert. den. 323 U. S. 728, 89 L. Ed. 585).

V.

The Undisputed Evidence Showed These 22 Vessels Covered by VS-14 Were Naval Vessels Because of (a) The Events Leading Up to Their Actual Use by the Navy; (b) The Nature of Their Actual Use by the Navy; and (c) Their Physical Characteristics.

(A) Although derived from standard commercial hulls and propulsion machinery, they, and each of them, were converted structurally and specially equipped to the extent necessary for their intended naval use [R. 259-295, 304-333].

(B) These conversion features cost the Navy \$34,-213,000.00, which sum the Navy paid the Commission from Navy funds [R. 341].

(C) They were delivered into the control, custody and sole right of possession of the Navy between the 16th day of August, 1944, and the 16th day of December, 1944 [R. 754, 338].

(D) After their delivery into the control, custody and sole right of possession of the Navy, they, and each of them, were officially commissioned as ships of the United States Navy [R. 338-339].

(E) They, and each of them, were given official naval letter classification "APA," which constitutes official naval abbreviations for the following words: "Auxiliary Transport Attack" respectively [R. 753, 305-312].

(F) They, and each of them, were given official naval names [R. 753, 305-312].

(G) They, and each of them, were given official naval number designators within the APA letter classification [R. 753, 305-312].

(H) They were actually used by the Navy as an adjunct of the combatant fleet [R. 259-295].

(I) With the exception of two of these 22 vessels, they all remained in the control, custody and sole right of possession of the United States Navy from the date of delivery of each to the United States Navy until on or about July 1, 1947 [R. 339].

(J) That with the exception of one of these vessels, legal title to each and all of them was transferred by the Commission to the Navy on or about January 14, 1946 [R. 340].

VI.

Quite Aside From the Events Leading Up to Their Actual Use by the Navy and Their Physical Characteristics, Undisputed Evidence Showed That These Vessels Were Constructed by the Commission for the Intended Ultimate Use of the Navy Pursuant to Letter Arrangement Between the Two Agencies and Because of This Intended Ultimate Use by the Navy, They Are Naval Vessels as a Matter of Law.

“But the petitioner contends that, even if that is true, the construction of vessels or other military equipment or supplies is in a different category. It argues that none of the articles shipped in the present case was military or naval, since they were not furnished to the armed forces for their use. They were supplied, so the argument runs, for manufacture and construction which are civilian pursuits and which were here in fact performed by civilian contractors. Only the completed product, not the component elements, was, in that view, for military or naval use.

“Military or naval property may move for civil use, as where Army or Navy surplus supplies are shipped for sale to the public. But in general the use to which the property is to be put is the controlling test of its military or naval character. Pencils as well as rifles may be military property. Indeed, the nature of modern war, its multifarious aspects, the requirements of the men and women who constitute the armed forces and their adjuncts, give military or naval property such a broad sweep as to include almost any type of property. More than articles actually used by military or naval personnel in combat are included. Military or naval use in-

cludes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in training or preparation for war, in combat, in maintaining them at home or abroad, in their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is controlling under §321(a). The property in question may have to be reconditioned, repaired, processed or treated in some other way before it serves their needs. But that does not detract from its status as military or naval property. *Southern P. Co. v. Defense Supplies Corp.* (D. C. Cal.), 64 F. Supp. 605. Within the meaning of §321(a) an intermediate manufacturing phase cannot be said to have an essential 'civil' aspect, when the products or articles involved are destined to serve military or naval needs. It is the dominant purpose for which the manufacturing or processing activity is carried on that is controlling."

Northern Pacific Railway Company v. United States of America, 330 U. S. 248, 91 L. Ed. 876.

(a) *November 9, 1943.* Admiral William D. Leahy, USN, as Chief of Staff to the Commander in Chief of the Army and Navy, acting for the Joint Chiefs of Staff, in a letter to Rear Admiral E. S. Land, Chairman of the Commission, requested the Commission "to construct 130 standards APAs * * * to be completed as early in the fourth quarter of 1944 as practicable." He refers to these vessels as "military types" [R. 724].

The 22 vessels subsequently covered by VS-14 were derived from and a part of this original group of 130 standard APAs [R. 340, 737].

(b) *December 6, 1943.* Rear Admiral E. S. Land, Chairman of the Commission, in a letter to the Secretary of Navy, acknowledges receipt of the Admiral Leahy letter of November 9, 1943 (6(a) *supra*), and advises the Secretary of Navy where the requested vessels will be constructed and confirms certain decisions reached between them, the Commission and the Navy's Bureau of Ships, with regard to the program insofar as design, working plans, drawings and design plans are concerned. He asks for naval confirmation of these decisions [R. 726 to 729, incl.].

(c) *December 10, 1943.* The Navy's Bureau of Ships, in a letter to the Chairman of the Commission, acknowledges receipt of the Rear Admiral Land letter of December 6, 1943 (6(b) *supra*) and confirms its contents with certain exceptions therein noted [R. 730 to 732, incl.].

(d) *December 11, 1943.* Rear Admiral E. S. Land, Chairman of the Commission, in a letter to the Secretary of Navy, supplements his letter of December 6, 1943 (6(b) *supra*) by adding certain additional information concerning the program. Apparently this letter crossed the Navy's reply letter (6(c) *supra*) in the mails [R. 733 to 734, incl.].

(e) *February 29, 1944.* The Hon. Frank Knox, Secretary of Navy, in a letter to the Chairman of the Commission, confirms the program as set forth

in letters (6(b), (6(c) and 6(d) *supra*) and agrees to accept the vessels on a loan charter basis under conditions whereby (1) delivery to be made at builder's yards in accordance with plans and specifications and including successful tests; (2) control, custody and sole right of possession of each vessel to be in Navy for duration of emergency; (3) Navy to return the vessels after termination of emergency as conditions permit [R. 735 to 741, incl.].

In this letter, VS-14 vessels are specifically referred to on page 1 in Enc. A. by Commission hull number 552 to 573, inclusive, Navy No. 204 to 225, inclusive, Vessel type VC2-S-AP5 and place of construction, Permanente Metals Corporation Richmond No. 2, Richmond, California.

(f) *June 3, 1944.* Rear Admiral E. S. Land, for the Commission, by letter to Secretary of the Navy, refers to the letter of February 29, 1944, from the Secretary of the Navy (6(e) *supra*) and states that the Navy should reimburse the Commission for any and all expenses incurred in any manner in connection with the delivery and conversion features incorporated in the vessels at the request of the Navy. He asks for acknowledgment from the Secretary of the Navy for this additional condition to the transfer of these vessels [R. 742 to 744, incl.].

(g) *July 3, 1944.* The Hon. James Forrestal, Secretary of the Navy, in a letter to the Chairman

of the Commission, agreed to the additional condition of the naval reimbursement to the Commission as requested by Rear Admiral Land in his letter of June 3, 1944 (6(f) *supra*) and the matter of terms and conditions of the procurement of these vessels from the Commission by the Navy became complete [R. 744 to 745, incl.].

VII.

Regulation of So-called Excess Profits From the Construction of Naval Vessels During the Period of the Excess Profits Tax Was Required by the Unequivocal Terms of Section 401, to Be Carried Out Only Under the Provisions of the Internal Revenue Code.

The Vinson-Trammell Act established a method for controlling the profits to be made by contractors and subcontractors engaged in naval construction. This is clear from the profit limiting provision of the Act itself (34 U. S. C. A. 496a).

Pressed Steel Tank Company v. The Commissioner, 133 F. 2d 776;

Commissioner v. Aluminum Company of America, 142 F. 2d 663.

The system there devised carried along satisfactorily until the imminence of the entry of the United States into the late great war. At that time obviously the scope of military and naval construction vastly increased, and it is a matter of common knowledge that large segments of American business and industry became deeply engaged in military and naval construction. The limited scheme

for limitation of profits to be made on naval construction no longer satisfied the practical situation and in fact, it proved to be a positive hindrance to the naval construction program for the reason that it placed persons and corporations engaged in naval work at a positive disadvantage when compared with persons and corporations engaged in other aspects of the military and defense program.

In the fall of 1940 these facts had become obvious; likewise the need for a scheme of regulation of so-called excess profits which would extend to every phase of the military and naval construction programs had become apparent. The Revenue Act of 1940 was the scheme devised by Congress in the light of existing facts and seeming needs to supply a scheme for the control of excess profits. Section 401 of that Act was the means taken by Congress to integrate naval construction with the general scheme. The phraseology of Section 401 of that Act is clear and definite and is to the effect that for the duration of the excess profits tax, no separate or subsidiary plan for the control of excess profits should be carried out for naval construction.

The foregoing statements as to the meaning and purpose of Section 401 are based upon the House Committee Report made when the Revenue Act was presented to Congress for its consideration. The pertinent parts of the report read as follows:

“In its report on the revenue bill of 1940, your Committee expressed the desire that the rearmament program should furnish no opportunity for the creation of new war millionaires or the further substantial enrichment of already wealthy persons. *Your committee is still of this opinion but, at the same*

time, deems it advisable to stimulate the cooperation of private enterprise in the defense program by suspending the profit limitations of the Vinson-Trammell Act, applicable to the construction of naval vessels and Army and Navy aircraft. In addition, it is considered desirable to provide special amortization with respect to the facilities necessary in the national defense, in order further to encourage the participation of private enterprise in the rearmament program.

“While these benefits are being accorded to business engaged directly in the defense program, your committee feels that they should be accompanied by a general excess-profits tax rather than one limited to contractors for Army and Navy aircraft and naval vessels or even to munitions manufacturers generally. Accordingly, the tax provided in the bill will apply to corporate profits from all sources. This is felt desirable since the segregation of profits directly attributable to the expenditures of the Government for the defense program presents insuperable difficulties.

*“For these reasons your committee recommends the incorporation in the same bill of these three interrelated features, each of great importance to the financial aspects of the defense program: the suspension of the profit limitations under the Vinson-Trammell Act, the provision of special amortization for defense facilities, and an excess-profits tax * * *.*

“Upon thorough examination, it appeared that the excess-profits tax should apply only to corporations, as individual and partnership incomes are subject to heavy surtaxes upon net income, whether or not left in the business, while, in general, neither corporations nor their stockholders pay surtaxes upon earn-

ings which are not distributed. Moreover, since all of the assets of an individual, whether he be a sole proprietor or a member of a partnership, are at the risk of the business, it is extremely difficult, if not impossible, to determine the capital actually invested.

* * *

“The provisions of the Vinson-Trammell Act, as amended, relating to limitation of profit on contracts for the construction or manufacture of naval vessels and Army and Navy aircraft, are suspended as to contracts or subcontracts for such construction or manufacture which are entered into or completed during the taxable years to which the excess-profits tax will be applicable.

“Since the proposed excess-profits tax will apply to all corporations, including corporations now subject to the special profit-limiting provisions of the Vinson-Trammell Act, it is felt that such special provisions should not apply while the excess-profits tax is in force. Uniformity will thereby be achieved in the treatment for tax purposes of all abnormal profits resulting from the national defense program. It is not believed that the limited types of businesses affected by the Vinson-Trammell Act should be treated, during the period in which the excess-profits tax applies, differently from the way in which other businesses engaged in production for the national defense are treated.”

H. R. No. 2894 (August 28, 1940, 76th Congress), Cum. Bull. 1940-2, p. 496.

Congressional debate and reports may be considered in determining the background of legislation, and the history of the times in which the legislation was passed, in order to arrive at the ends intended to be achieved.

U. S. v. Trans-Missouri Freight Association, 166
U. S. 290, 41 L. Ed. 1007;

Standard Oil Co. of New Jersey et al. v. U. S.,
211 U. S. 1, 55 L. Ed. 619;

Federal Trade Commission v. Raladam Co., 283
U. S. 643, 75 L. Ed. 1324.

The provisions and meaning of Section 401 of the Revenue Act are clear and definite. The plan or scheme for the regulation of excess profits on military and naval construction of all types which is contained in the Revenue Act of 1940 is likewise clear and definite. Any plan purporting to regulate so-called excess profits upon naval construction which flies in the face of the prohibitions of Section 401 and which does not conform with the method of regulation laid down by Congress must be ineffective and may not be enforced.

“It is clear that contracts in direct violation of statutes expressly forbidding their execution cannot be enforced. * * * [It is a question of] absolute want of power to do that which is inhibited by statute and if attempted, is in positive terms declared utterly null and void.”

Gibbs v. Consolidated Gas Co. of Baltimore, 130
U. S. 396, 32 L. Ed. 979.

“For there is a limitation upon the above rule to the effect that where the contract is illegal or against public policy the courts will refuse to en-

force it and will leave the parties where it finds them, regardless of the fact that one of them may be retaining benefits received thereunder. (*Visalia Gas etc. Co. v. Sims*, 104 Cal. 326 (43 Am. St. Rep. 105, 37 Pac. 1042.) A contract that is unlawful as being against the express provisions or general policy of any particular statute is void and will not be enforced by the courts. (See note to *In re Assignment Mutual Guaranty Fire Ins. Co.* (107 Iowa 143, 77 N. W. 868), 70 Am. St. Rep. 149, at p. 170, and cases cited thereunder.)”

Pacific Electric Railway Co. v. Commonwealth Bonding & Casualty Ins. Co., 55 Cal. App. 704 (204 Pac. 262).

VIII.

Unrealistic Stress Upon Technicalities Must Be Adopted in Order to Conclude That Subcontract VS-14 Is Not a Subcontract Falling Within the Provisions of Section 401 of the Revenue Act of 1940.

Section V of this brief shows that having regard to the use and operation of vessels constructed under subcontract VS-14, they were naval vessels.

Section VI of this brief shows that having regard to the manner in which the construction of these vessels was undertaken, they were constructed pursuant to agreements between the United States Navy and the Commission and were planned and constructed to fulfill the Navy's requirements.

Section VII of this brief shows that where naval construction was involved, it was the expressed policy of the Congress of the United States that there should be no

other scheme for the control of so-called excess profits than as provided by the Congress in the Revenue Act of 1940.

To avoid these facts and the necessary conclusion therefrom that Special Provision 4 of subcontract VS-14 is a prohibited plan for the collection of so-called excess profits, there seems only one answer: to lay a wholly unnecessary and unrealistic stress upon technicalities of the wording of the contract and the statute.

Permanente has stressed the fact that the prime contract under which subcontract VS-14 was entered into was not originally a contract with the Secretary of the Navy. Admittedly the Prime Contract antedates the arrangements which were made for the construction of these vessels and was made by the Maritime Commission. However, the profit limitation provision of the Vinson-Trammell Act was never considered to depend upon the strict technicality of the contracting authority. The profit limitation provision, self-explanatory as to its purpose, was carried over in subsequent years and subsequent acts and made applicable to military aircraft in the following terms:

“All the provisions of Section 496 of Title 34 shall be applicable with respect to contracts for aircraft or any portion thereof for the Army to the same extent and in the same manner that such provisions are applicable with respect to contracts for aircraft or any portion thereof for the Navy.” (53 Stat. 555; 10 U. S. C. A. 311.)

The Merchant Marine Act of 1936 contains an essentially similar provision, a very obvious adaptation of the provision in the Vinson-Trammell Act (46 U. S. C. A. 1155b). Finally, in connection with the War and Defense Contract Act of June 28, 1940 (54 Stat. 676) it was

provided that “no contract shall be made for the construction or manufacture of any complete naval vessel or any portion thereof” unless the contractor agrees to pay into the Treasury profits in excess of 8 per centum. (50 U. S. C. A. App. 1152.) The profit limitation clause required by Section 496 has been used, therefore, in four different cases. The use in this manner indicates clearly that it is the subject matter of the contract that is determinative and not the contracting authority.

It is apparent from such adaptations that the usefulness and effect of the profit limitation provision was considered to rest upon the type of construction involved and was not considered to rest solely upon the question who was the contracting authority. Thus the applicability of Section 496a should not be determined by asking whether the prime contract was with the Secretary of the Navy, but should be determined by asking whether the vessels involved were naval vessels or were intended to be used as such.

The *Northern Pacific* case, *supra*, in its discussion of the question of title to property, is directly applicable also to this question. Even more in point is the case of *Southern Pacific Co. v. Defense Supplies Corp.*, 64 Fed. Supp. 607, where it was urged that only officers authorized by Congress to purchase for the Army or Navy could make contracts resulting in the classification of the property contracted for as military or naval property. The Court said:

“It is true, as stated by plaintiff, that pursuant to its constitutional powers to raise and equip armies and navies, Congress has from time to time appropriated monies to acquire properties for the armed forces and has designated the officers authorized to

so act, in the case of the Army, by 10 U. S. C. A., §1191, and in the case of the Navy, by 34 U. S. C. A., §560. It is also true that defendant corporation has no Congressional authority to make purchases for the Army or Navy Departments.

“But it does not follow at all that, within the purview of the Transportation Act of 1940, property purchased and transported by the Defense Supplies Corporation may not be ‘military or naval property’ of the United States. The words ‘military’ and ‘naval’ as used in the Act are descriptive adjectives. In context they may refer to property of the War or Navy Departments but they also properly and logically are descriptive, irrespective of ownership, of the nature of the property itself, with respect not merely to its tangible form and characteristics but as well, as is the case here, to the nature of its contemplated use. Having in mind the history of the ‘land grant allowance’ legislation, it is clear to me that Congress did not intend to retain for the benefit of the United States reduced rates for the transportation only of property assigned to the War or Navy Departments and fit for immediate use and not for its property undeniably dedicated to military use but not yet assigned to the War Department because not at the moment in the ultimate form usable in actual conflict.” (Affirmed *sub nom*, *Southern Pacific Company v. Reconstruction Finance Corporation* (C. C. A. 9), 161 F. 2d 56 (cited with approval in *Northern Pacific Railway Co. v. U. S.*, *supra*).)

In the *Northern Pacific* case, *supra*, the Supreme Court of the United States specifically approved of this decision.

Furthermore, despite the fact that prime contract shows only the Maritime Commission as the signatory party,

that fact cannot be relied upon to escape the provisions of 496a. In effect, unless the Commission can claim to stand in its own right as a contracting agency with respect to these 22 vessels and make that claim so as to make the vessels Maritime Commission vessels, Section 496a is applicable. The Commission cannot make that claim. There appear to be two different sources of authority granted by Congress under which the Commission undertakes the construction of vessels.

The first of these sources is contained in the Merchant Marine Act of 1936 (46 U. S. C. A. 1101, *et seq.*) and in particular, subchapter 5 thereof, providing for the construction differential subsidy (46 U. S. C. A. 1151-61). A brief reading of the code provisions suffices to show that these vessels were not built and that the prime and subcontracts here involved were not entered into under their authority.

The second source of authority under which the Commission undertakes the construction of vessels is to be found in Public Law 5, the joint resolution of February 6, 1941 (55 Stat. 5, 46 U. S. C. A. 119a), see Appendix "A."

Aside from the question whether the Commission's authority to build these vessels must not have been necessarily derived from that law, the prime contract specifically states in paragraph 1 of its preamble that it was entered into under the authorities of Public Laws 247 and 630 of the 77th Congress. As will be shown in succeeding paragraphs, those two laws directly adopt Public Law 5 and show beyond the shadow of a doubt that the Commission's powers in connection with the vessels con-

templated by prime contract are derived from and delimited by Public Law 5.

Public Law 5 provided in subsection 1 for the creation of an emergency ship construction fund for the United States Maritime Commission, to be available for the construction of cargo vessels of such type, size and speed as the Commission may determine to be useful in time of emergency for carrying on the commerce of the United States. Subsection 2 of that Act (46 U. S. C. A. 1119b) sets forth the several other laws or provisions that should control the acts of the Maritime Commission in carrying out its duties under the first section. Among the provisions in the Merchant Marine Act of 1936, only Section 207 (46 U. S. C. A. 1117) was made applicable, and that section gives the Commission power to enter into contracts in the same manner that a private corporation may contract within the scope of authority conferred by its charter. Section 4 of the same act (46 U. S. C. A. 1125a) *further authorized the Commission to construct and repair and outfit vessels for any other department or agency of the government "to the extent that such other department or agency is authorized by law to do so for its own account."*

Public Law 247 (First Supplemental National Defense Appropriation Act of 1942, 55 Stat. 669), see Appendix "B," one of the authorizing laws referred to in the prime contract, makes an appropriation to the construction fund for the Merchant Marine Act of 1936 and for vessel construction. This Act specifically provides that Sections 2 and 4 of Public Law 5 shall apply to all the activities and functions which the Commission is authorized to perform under this law.

Public Law 630 (the Independent Offices Appropriation Act of 1943, 56 Stat. 392), see Appendix "C," the other of the authorizing laws referred to in the prime contract, makes a further appropriation of money to the construction fund established under the Merchant Marine Act and provides that the construction fund shall be available to carry out the activities and functions which the Commission is authorized to perform under Public Law 247.

Public Law 5 authorizes the *construction of emergency shipping* and also *construction for other agencies or departments of government*, and the terms of that law, through its incorporation in Public Law 247 and 630, indicate directly the authority under which the prime contract was entered into and the scope of the Commissioner's powers in connection with the vessels constructed under the contract.

It is not important, therefore, that the prime contract under which subcontract VS-14 was entered into was made with the Maritime Commission. It is not important that the vessels upon which Birnie worked were originally contemplated as a part of the emergency ship construction program and were originally contemplated to be constructed under the authority of Section 1 of Public Law 5. It is abundantly clear that prior to the time VS-14 was entered into, the Navy had been authorized to procure this type of vessel and had been granted by Congress the funds necessary to procure them. That the Navy, having the authority and having the funds, elected to obtain these vessels through or from or in conjunction with the United States Maritime Commission is shown

by the correspondence between the two agencies and by in particular Addendum 2 to the prime contract wherein Permanente and the Maritime Commission recognized the altered status of these vessels and the additional costs thereby incurred.

Therefore, at a time prior to entering into subcontract VS-14, the vessels involved in that contract and originally planned for the Maritime Commission were segregated for the United States Navy as a part of its authorization of auxiliary vessels to be paid for, so far as necessary, from its funds.

At the time that those facts were determined, and when the Maritime Commission, whether willingly or unwillingly, consented to that segregation, construction thereafter must have been under the authority of Section 4 of Public Law 5, for otherwise the Maritime Commission could not have undertaken this work for the United States Navy.

It is not important to this case to determine whether the course of correspondence and agreement between the Maritime Commission and the Navy Department constituted the Maritime Commission an agent for the Navy Department so that it can be said that with respect to these 22 vessels the contract of Permanente with the Maritime Commission was thereafter the same as a contract made with the duly authorized agent of the Secretary of the Navy. It is submitted that in fact, and as shown by Addendum 2 to prime contract, this represents

the true situation, but in any event since from the time of segregation of these vessels for the United States Navy, construction must have been carried on under Section 4 of Public Law 5, and the Commission is as bound by restrictions of the authority on the Secretary of Navy or upon the Navy Department as would be the Secretary of Navy himself. What the Secretary of Navy could not have done in respect to these vessels, the Commission could not do.

Had the Secretary of the Navy undertaken this program, certainly Section 401 of the Revenue Act of 1940 would have been applicable. Permanente admits as much. The Commission could undertake the program at the Navy's request subject always to the same restrictions. Whether by virtue of the inter-agency correspondence and addendum No. 2 to the prime contract, the Commission became an agent of the United States Navy when it undertook the program, or whether it only became subject to the restrictions, does not matter; in either event it cannot do what the Secretary of the Navy could not do, and he could not evade Section 401 of the Revenue Act of 1940. Had the Secretary of Navy sought to require the insertion of Special Provision No. 4 in VS-14, or had he sought to permit the prime contractor to make such insertion, Section 496a would serve to either prohibit the insertion or to render the insertion *without effect* with respect to these 22 vessels. The Maritime Commission stands in no different position than the Secretary of Navy and Special Provision No. 4 is without effect.

Conclusion.

It is respectfully submitted that this court should upon the record before it reverse the judgment of the District Court and direct that the District Court enter judgment in favor of defendant Birnie for the sum of \$78,872.86, with interest. The record before this Court would authorize this reversal since the undisputed evidence and the law pertaining to the issues raised indicate error on the part of the District Court in having given effect to Special Provision No. 4 of VS-14. This for the reason that the undertaking on the part of Birnie to pay to Permanente profit in excess of ten per cent of the total contract price, the same to become the sole property of the Commission, is rendered without effect by virtue of Section 401 of Title IV of the Second Revenue Act of 1940. This accounting for profit should be made direct to the Bureau of Internal Revenue so that Birnie may gain the privilege of applying against this amount such losses as he may have incurred during the appropriate taxable years.

Respectfully submitted,

HILL, FARRER & BURRILL,

By ELLIOTT H. PENTZ,

Attorneys for Appellant John Urquhart Birnie.

APPENDIX "A."

PUBLIC LAW 5: JOINT RESOLUTION OF FEBRUARY 6, 1941 (55 STATS. 5, 46 U. S. C. A. 1119a, b. 1125a.).

Section 1: "For the purpose of providing as rapidly as possible cargo ships essential to the commerce and defense of the United States there is hereby appropriated to the United States Maritime Commission, out of any money in the Treasury not otherwise appropriated, the sum of \$313,500,000, to remain available until expended, which amount shall be additional to the \$500,000 allocated from the Emergency Fund for the President in the Act of June 13, 1940, ch. 343, §1, 55 Stat. 377, and \$36,000,000 to be allocated during the fiscal year 1942 from funds available for the payment of obligations incurred for the purposes hereof under the contract authorizations under such emergency fund for the President, the total of such sums, aggregating \$350,000,000, to be known as the 'Emergency Ship Construction Fund, United States Maritime Commission,' which fund shall be available for the payment of said contract authorizations and for (1) the construction in the United States of oceangoing cargo vessels of such type, size, and speed as the Commission may determine to be useful in time of emergency for carrying on the commerce of the United States and to be capable of the most rapid construction; (2) the production and procurement of parts, equipment, material, and supplies for such ships; (3) the establishment, acquisition, construction, enlargement, or extension of plants or facilities, on land whether owned by the Government or otherwise owned (including the acquisition by purchase or condemnation of real property or any interest therein), to be used for the construction of ships or for the production of parts, equipment, supplies, or material there-

for, and the maintenance, repair, operation (under lease or otherwise), and management of such plants and facilities; and (4) all administrative expenses in connection with the program provided herein including personal services at the seat of government and elsewhere: *Provided*, That the employment of personnel engaged in the maintenance, repair, operation, or management of plants or facilities shall be without regard to the civil service and classification laws: *Provided further*, That no part of this appropriation shall be used to pay the salary or wages of any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence: *Provided further*, That for the purposes hereof an affidavit shall be considered *prima facie* evidence that the person making the affidavit does not advocate, and is not a member of an organization that advocates, the overthrow of the Government of the United States by force or violence: *Provided further*, That any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence and accepts employment the salary or wages for which are paid from this appropriation shall be guilty of a felony and, upon conviction, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both: *Provided further*, That the above penalty clause shall be in addition to, and not in substitution for, any other provisions of existing law.”

Section 2: “The provisions of section 1117 of this title and the Act of October 10, 1940, ch. 838, 54 Stat. 1092, shall apply to all the activities and functions which the Commission is authorized to perform under section 1119a of this title; and the Commission is authorized to

carry on the objects, activities, and functions provided for in section 1119a of this title, without regard to the provisions of section 733 of Title 33, section 529 of Title 31, and section 5 of Title 41; section 744g of Title 18, relating to the purchase of prison-made goods; sections 270a-270d of Title 40, requiring performance and other bonds on public works; section 303b of Title 40, relating to the lease of Government property, and any provision of law relating to the disposal of surplus Government property.”

Section 4: “The Commission is authorized to construct, reconstruct, repair, equip, and outfit, by contract or otherwise, vessels or parts thereof, for any other department or agency of the Government, to the extent that such other department or agency is authorized by law to do so for its own account, and any obligations heretofore or hereafter incurred by the Commission for any of the aforesaid purposes shall not diminish or otherwise affect any contract authorization granted to the Commission: *Provided*, the obligations incurred or the expenditures made are charged against and, to the amount of such obligation or expenditure, diminish the existing appropriation or contract authorization of such department or agency.”

APPENDIX "B."

PUBLIC LAW 247: FIRST SUPPLEMENTAL NATIONAL DEFENSE APPROPRIATION (55 STAT. 669 at 681).

"Title III—United States Maritime Commission.

"Construction fund, United States Maritime Commission, Act of June 29, 1936, revolving fund: For an additional amount to increase the construction fund established by the 'Merchant Marine Act, 1936,' and for (1) the construction in the United States of merchant vessels of such type, size, and speed as the United States Maritime Commission (hereafter referred to in this title as the 'Commission') may determine to be useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries; (2) the production and procurement of parts, equipment, material, and supplies for such vessels; (3) the establishment, acquisition, construction, enlargement, or extension of plants or facilities, on land, whether owned by the Government or otherwise owned (including the acquisition by purchase or condemnation of real property or any interest therein), to be used for the construction of vessels or for the production of parts, equipment, supplies, or material therefor, and the maintenance, repair, operation (under lease or otherwise), and management of such plants and facilities; and (4) the purchase, requisition, charter, operation, repair, reconstruction, and reconditioning of vessels acquired, or the use or possession of which is acquired by the Act of June 6, 1941 (Public Law 101), or otherwise; \$698,650.00, of which \$2,000,000 shall be available for adminis-

trative expenses of the Commission, including the objects specified under the heading 'United States Maritime Commission' in the Independent Offices Appropriation Act, 1942, of which \$2,000,000 not to exceed \$40,000 shall be available for the transfer of household goods and effects, as provided by the Act of October 10, 1940 (Public Act Numbered 839), and regulations promulgated thereunder, including such expenses of persons employed by the Commission in furtherance of the program authorized by the Act of February 6, 1941 (Public Law 5), and \$150,000 shall be available for the employment on a contract or fee basis of persons, firms, and corporations for the performance of special services, without regard to section 3709 of the Revised Statutes: *Provided*, That said construction fund so supplemented shall be available for the foregoing purposes: *Provided further*, That there may be transferred from this appropriation to the 'Emergency Ship Construction Fund, United States Maritime Commission', created by the said Act of February 6, 1941, such amounts as the Commission may deem necessary for the completion of the program authorized by said Act: *Provided further*, That whenever the President deems it to be in the interest of national defense, he may authorize the Commission to lease vessels constructed or acquired with funds appropriated by this title to the Government of any country whose defense the President deems vital to the defense of the United States, in accordance with the provisions of the Act of March 11, 1941 (Public Law 11): *Provided further*, That in ad-

dition to contract authorizations contained in previous Acts, the Commission is authorized to enter into contracts for the construction of vessels, production and procurement of parts, equipment, material, and supplies for such vessels, and the establishment, acquisition, construction, enlargement, or extension of plants or facilities as provided herein in an amount not to exceed \$1,296,650,000 (for which \$296,650,000 is included in the amount appropriated herein): *Provided further*, That the provisions of sections 2 and 4, and several proviso clauses contained in section 1 of said Act of February 6, 1941, shall apply to all the activities and functions which the Commission is authorized to perform under this title."

APPENDIX "C."

PUBLIC LAW 630: INDEPENDENT OFFICES APPROPRIATION (56 STAT. 392 at 418).

"United States Maritime Commission

"To increase the construction fund established by the 'Merchant Marine Act, 1936', \$980,080,000, of which not to exceed \$9,956,734 shall be available for administrative expenses of the United States Maritime Commission, including the following: Personal services in the District of Columbia and elsewhere; travel expenses in accordance with the Standardized Government Travel Regulations and the Act of June 3, 1926, as amended, including not to exceed \$2,500 for expenses of attendance, when specifically authorized by the Chairman of the Commission, at meetings concerned with work of the Commission; printing and binding; lawbooks, books of reference, and not to exceed \$6,000 for periodicals and newspapers; contract stenographic reporting services; procurement of supplies, equipment, and services, including telephone, telegraph, radio, and teletype services; purchase and exchange (not to exceed \$2,500), maintenance, repair, and operation of passenger-carrying automobiles for official use; typewriting and adding machines, and other labor-saving devices, including their repair and exchange; expenses (not exceeding \$60,000) for transfer of household goods and effects as provided by the Act of October 10, 1940 (Public, Numbered 839), and regulations promulgated thereunder; necessary expenses (not exceeding \$6,000) incident

to the education and training of personnel of the Commission detailed at institutions for scientific education and research as authorized by the Act of August 4, 1939; compensation as authorized by said Act of August 4, 1939, for officers of the Army, Navy, Marine Corps, or Coast Guard, detailed to the Commission; allowances for living quarters, including heat, fuel, and light, as authorized by the Act of June 26, 1930; and including not to exceed \$255,000 for the employment, on a contract or fee basis, of persons, firms, or corporations for the performance of special services, including accounting, legal, actuarial, and statistical services, without regard to section 3709 of the Revised Statutes: *Provided*, That the sum of not less than \$20,000,000 from the said construction fund shall be available for the construction of towboats and barges adapted for use in the transportation of oil, gasoline, fuels, and other commodities over the inland or coastal waters of the United States: *Provided*, That the said construction fund shall be available for carrying out the activities and functions which the Commission is authorized to perform under title III of the First Supplemental National Defense Appropriation Act, 1942 (Public Law 247); *Provided further*, That the said construction fund shall be available for carrying out the provisions of Executive Order Numbered 9112 of March 26, 1942; *Provided further*, That the amount of contract authorizations contained in the Independent Offices Appropriation Act, 1942, and Acts prior thereto, for carrying out the provisions of the Merchant Marine Act, 1936, as amended, is hereby increased by \$90,000,000."

No. 12,766

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN URQUHART BIRNIE, an individual doing business as Birnie Electric Company, and MASSACHUSETTS BONDING AND INSURANCE COMPANY (a corporation),

Appellants,

vs.

THE PERMANENTE METALS CORPORATION (a corporation), and UNITED STATES MARITIME COMMISSION,

Appellees.

BRIEF FOR APPELLEE,
THE PERMANENTE METALS CORPORATION.

BRUCE WALKUP,

220 Montgomery Street, San Francisco 4, California,

WILLIS S. SLUSSER,

THELEN, MARRIN, JOHNSON & BRIDGES,

111 Sutter Street, San Francisco 4, California,

Attorneys for Appellee,

The Permanente Metals Corporation.

JUN 31 1951

PAVE & YBRIEN

Subject Index

	Page
I. Jurisdiction	1
II. Concise statement of case.....	2
III. Argument	7
A. Summary of argument	7
B. Argument	8
1. The court below properly resolved the legal issue in favor of Permanente as a matter of law because:	
a. The excess profits provision of VS-14 was a valid and binding contractual provision, predicated upon sound policy and good business practice, and designed to prevent exorbitant wartime profit-making by commission shipyard subcontractors.....	8
b. Section 496a of Title 34 U.S. Code was not applicable in this case as a matter of law...	10
(1) The limited effect of Section 496a was to suspend the profit limiting provisions of the Vinson-Trammell Act relating to construction of naval vessels or portions thereof under contract with the Secretary of the Navy.....	10
(2) Section 401 of the Revenue Act of 1940 (Section 496a) does not have the broad effect ascribed to it by Birnie.....	20
(3) Subcontract VS-14 was not a subcontract for the construction of complete naval vessels or portions thereof under the Vinson-Trammell Act	24
2. The foregoing points support the judgment as a matter of law. The remaining questions raised by Birnie are entirely immaterial.....	33
a. Section 496a was not made applicable in this case because of the following immaterial	

	Page
matters, claimed by Birnie to render Section 496a applicable:	
(1) After construction the vessels were ultimately turned over to the Navy by the Commission and were used by the Navy and were treated in some respects as naval vessels	34
(2) The vessels had certain conversion features desired and approved by the Navy and ultimately paid for by the Navy	36
(3) The Navy eventually acquired legal title to all but one of the vessels	38
b. Section 396a was not made applicable in this case because of the events leading up to the use of the vessels by the Navy, likewise claimed by Birnie to render Section 496a applicable	39
c. Even if the vessels had been constructed under the Vinson-Trammell Act, Section 496a would not prohibit the use of the excess profits clause used in VS-14	45
3. Birnie's specification of errors is without merit	47
Conclusion	48

Table of Authorities Cited

Cases	Pages
Commissioner of Internal Revenue v. Aluminum Company of America (C.C.A. 3), 142 F.(2d) 663 (Cert. den. 323 U.S. 728, 89 L.Ed. 585)	15, 28
Douglas Aircraft Co., Inc. v. Commissioner (1942), 46 B.T.A. 1025	17
Eric Forge Co. v. Commissioner (Dkt. 2283, Dec. 29, 1945, T.C. Memo. Op. 4 C.C.H. T.C. Memo. Dec. 1127.....	16
Foster-Wheeler Corp. v. Commissioner (1940), 42 B.T.A. 36	16
Northern Pacific Railway Company v. United States of America, 330 U.S. 248, 91 L.Ed. 876.....	40
Pressed Steel Tank Co. v. Commissioner of Internal Revenue (C.C.A. 7), 133 F.(2d) 776	28
Southern Pacific Co. v. Defense Supplies Corp. (D.C. Cal.), 64 F. Supp. 605	40
United States v. Bonnell (1950), C.C.A. 9, 180 F.(2d) 145	9
Waterbury Tool Company v. Commissioner (1943), 2 T.C. 904	16

Statutes

Merchant Marine Act of 1936 (46 U.S. Code, Sections 1101 et seq.)	37
Merchant Marine Act of 1936 (Act of June 29, 1936, 49 Stat. 1985)	26
Public Law 5, Section 4, 77th Congress (55 Stat. 5, 46 U.S. Code 1119a, b, 1125a)	26
Public Law 76, 78th Congress (34 U.S. Code, Section 498d-2; 57 Stat. 156)	37
Public Law 204, 77th Congress.....	45
Public Law 247, 77th Congress (55 Stat. 669, Act of August 25, 1941)	25, 26, 35

	Pages
Public Law 630, 77th Congress (56 Stat. 392, Act of June 27th, 1942)	26, 35
Revenue Act of 1940, Title IV, Section 401	4, 5, 7, 11, 21, 23
Revenue Act of 1940, Section 402	23
48 Stat. 503	14
49 Stat. 1985	37
54 Stat. 1003	11
34 U. S. Code:	
Section 494	14
Section 495	14
Section 497	14
46 U. S. Code Section 1101 et seq.	26
34 U.S.C.A.:	
Section 496a	4, 5, 7, 8, 10, 11, 12, 17, 19, 23, 34, 39, 45
Vinson-Trammell Act, Section 3 (34 U. S. Code, Section 496)	11, 12, 14, 19, 29, 45, 46

Miscellaneous

H.R. No. 2894, Seventy-sixth Congress, Third Session, August 28, 1940, Int. Rev. Cum. Bull. 1940-2, page 496.....	20
House Committee Report (Int. Rev. Cum. Bull. 1940-2, page 507)	21
House Committee Report (H.R. No. 2894, Seventy-sixth Congress, Third Session, August 28, 1940, Int. Rev. Cum. Bull., 1940-2, page 507.....	46
37 Op. of the Atty. Gen. 487	18
37 Op. of the Atty. Gen. 488	18
Senate Committee Report (S.R. No. 2114, Seventy-sixth Congress, Third Session, September 11, 1940, Int. Rev. Cum. Bull. 1940-2, page 528, at page 544).....	22
Treasury Department Regulations (T.D. 4.906, Internal Revenue Bulletins, 1939-2 C.B. 404):	
Section 17.1(c)	19
Section 17.1(d)	19
Section 17.1(e)	19

No. 12,766

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN URQUHART BIRNIE, an individual doing business as Birnie Electric Company, and MASSACHUSETTS BONDING AND INSURANCE COMPANY (a corporation),

Appellants,

VS.

THE PERMANENTE METALS CORPORATION (a corporation), and UNITED STATES MARITIME COMMISSION,

Appellees.

BRIEF FOR APPELLEE,
THE PERMANENTE METALS CORPORATION.

I. JURISDICTION.

Appellant Birnie's statement of the pleadings and facts disclosing the jurisdiction of the District Court and of this Court (App's. Op. Br. pp. 1-2) is correct and is adopted by appellee Permanente.¹

¹We have likewise adopted an abbreviated terminology and will refer to the parties herein as "Permanente", "Birnie", "the Commission", and to Subcontract VS-14 merely as "VS-14".

II. CONCISE STATEMENT OF CASE.

On April 22, 1943, Permanente entered into a prime contract with the Maritime Commission, designated as Contract No. MCo-15762 (R. 595-626) whereby Permanente agreed as prime contractor to construct certain Commission Design VC2-S-AP2 vessels, commonly known as Victory Cargo ships and as AP2s, for the Commission.

On May 29, 1944, Permanente and Birnie entered into a subcontract under said prime contract, approved by the Commission, designated as Vessels Subcontract VS-14 (R. 13-38) whereby Birnie agreed to perform certain work on 22 Design VC2-S-AP5 vessels (a modification of the Victory Cargo ships, commonly known as AP5s) covered by Addendum No. 2 to said prime contract (R. 626-631), such work consisting of installing degaussing, radar, voice tube, mechanical telegraph and mechanical wireways.

VS-14 contained a provision, designated as Special Provision 4, which provided in part as follows (R. 18-20):

“4. Report of Cost—Excess Profits: The Subcontractor (Birnie) agrees to account for and pay to the Contractor (Permanente) certain profits derived under this contract, and for such purposes agrees:

* * * * *

(b) *To pay to the Contractor profit as shall be determined by the Commission in excess of ten (10) per cent of the total contract price which amount shall become the sole property of the Commission.*²

* * * * *

²Emphasis supplied herein unless otherwise indicated.

It is further understood and agreed that the Commission shall prescribe the method of determining the Subcontractor's profits: * * * the accounting for profits and payments to be made under the provisions of this Article shall be in accordance with the provisions of Section 505 (b) of the Merchant Marine Act, 1936, as amended and the regulations of the Commission issued pursuant thereto * * * *it being understood and agreed that the obligation of the Subcontractor to make payments under this Article is contractual and that such payments shall in effect constitute a reduction of the amount of the contract price which the Contractor is entitled to retain.'*

Birnie undertook the performance of the work under VS-14 and in due course completed the actual work required to be performed by him.

On February 25, 1947, after Birnie had completed the performance of the work under VS-14, the Commission made a determination that the amount of excess profits, or profits in excess of 10% of the contract price, realized by Birnie under VS-14, was \$190,490.96, computed as follows:

Stated Contract Price		\$430,963.95
Cost of Performance	\$197,376.57	
Allowable Profit (10% of \$430,963.95)	43,096.40	240,472.99
	<hr/>	<hr/>
Recapturable (or Excess) Profits (R. 219-220).		\$190,490.96

Before the Commission made its determination of the amount of excess profits to be repaid by Birnie to Permanente, Permanente paid to Birnie for the work performed

by him under VS-14, the sum of \$389,419.56, or an overpayment of \$148,946.57.

Permanente demanded payment of said \$148,946.57 from Birnie, but Birnie refused to pay, claiming that Special Provision 4 of VS-14, relating to the repayment of excess profits, was void and without effect because of the alleged suspension of such profit limitation provisions by Section 401 of Title IV of the Revenue Act of 1940 (34 U.S.C.A. Sec. 496a). Birnie in turn demanded payment from Permanente of \$43,185.27, the balance which would be due to him if Special Provision 4 of VS-14 was in fact void and without effect.

Permanente also demanded payment by Birnie of \$1,545.66 for goods and services furnished to Birnie by Permanente. Birnie admitted his liability to pay this amount, but refused to pay it claiming it as an offset against Permanente's alleged indebtedness to him.

Permanente also claimed, in the Court below, that by Article 29 of the General Provisions of VS-14 Birnie was required to pay Permanente a reasonable attorney's fee if Permanente prevailed in the litigation.

The Court below held against Birnie's contention that the provisions of Special Provision 4 of VS-14 requiring the repayment of excess profits were ineffective. The Court thereupon concluded that Birnie must pay to Permanente, for the benefit of the Commission and to become the sole property of the Commission, said sum of \$148,946.57, less an offset of \$34,687.59 which Permanente admittedly owed to Birnie under another sub-contract VS-28, or a net amount of \$114,258.98, plus said sum

of \$1,545.66, both with interest from the date of demand for payment, plus \$15,000.00 as a reasonable attorney's fee. The Court likewise denied Birnie's cross-complaint for \$77,872.86, consisting of said \$43,185.27 plus said amount of \$34,687.59 allowed as an offset.

The only question presented by this appeal is whether or not the Court below was correct in holding that the recapture of excess profits provisions of VS-14 were valid and effective and in rejecting Birnie's contention to the contrary. The only true issue presented is whether VS-14 was a contract to which Section 401 of the Revenue Act of 1940 (34 U.S.C.A. Sec. 496a), an amendment to the Vinson-Trammell Act which suspended the profit limiting provisions of the Vinson-Trammell Act as to certain contracts, was applicable.

Birnie has sought, however, to inject into the case, a false issue as to whether or not the vessels in question were "naval vessels". We have denominated this issue as a false issue because, as we will show herein, the real question is not whether they were naval vessels, but rather whether they were naval vessels *within the meaning of the amendment which suspended the profit limiting provisions of the Vinson-Trammell Act* (34 U.S. Code Sec. 496a), that is, naval vessels *constructed under a contract made by the Secretary of the Navy*. In order to establish that the recapture of excess profits provision of VS-14 is invalid Birnie must establish not only that the vessels in question were naval vessels, *but that they were naval vessels constructed under a contract made by the Secretary of the Navy*. We submit most emphatically that this

cannot be done because it is readily apparent from the subcontract and the prime contract under which these vessels were constructed that they were constructed under a contract with and by the Commission and not under a contract with or by the Secretary of the Navy.

Stated in broad relief and most realistically, the question involved in this case is: Is a subcontractor who entered into a \$430,963.95 subcontract for the construction of vessels for the Commission, which subcontract contained a contractual agreement to return all profits in excess of 10% for the benefit of the Commission, to be permitted to retain total profits of \$233,587.38, or more than 54% of the contract price, or is he to be limited, as he agreed by contract, to a reasonable profit of 10% of the contract price?

We have stated the issue in its broad aspect to forestall any misconception which the Court might otherwise gain from the opening brief of Birnie to the effect that Birnie is the unfortunate victim of a dastardly scheme on the part of the Commission to deprive Birnie of his legitimate profits or of his right to compute his federal income tax liability to his own best advantage based upon hindsight rather than foresight. All that we seek in this action is to hold Birnie to his contractual obligation which he undertook to assume along with the benefits which he was willing to accept when he entered into his contract with Permanente for the benefit of the Commission.

III. ARGUMENT.

A. SUMMARY OF ARGUMENT.

1. The Court below properly resolved the legal issue in favor of Permanente as a matter of law because:

a. The Excess Profits Provision of VS-14 was a valid and binding contractual provision, predicated upon sound policy and good business practice, and designed to prevent exorbitant wartime profit-making by Commission shipyard subcontractors.

b. Section 496a of Title 34 U. S. Code was not applicable in this case as a matter of law.

(1) The limited effect of Section 496a was to suspend the profit limiting provisions of the Vinson-Trammell Act relating to construction of naval vessels or portions thereof under contract with the Secretary of the Navy.

(2) Section 401 of the Revenue Act of 1940 (Section 496a) does not have the broad effect ascribed to it by Birnie.

(3) Subcontract VS-14 was not a subcontract for the construction of complete naval vessels or portions thereof under the Vinson-Trammell Act.

2. The foregoing points support the judgment as a matter of law. The remaining questions raised by Birnie are entirely immaterial.

a. Section 496a was not made applicable in this case because of the following immaterial matters, claimed by Birnie to render Section 496a applicable.

(1) After construction the vessels were ultimately turned over to the Navy by the Commission and were used by the Navy and were treated in some respects as naval vessels.

(2) The vessels had certain conversion features desired and approved by the Navy and ultimately paid for by the Navy.

(3) The Navy eventually acquired legal title to all but one of the vessels.

b. Section 496a was not made applicable in this case because of the events leading up to the use of the vessels by the Navy, likewise claimed by Birnie to render Section 496a applicable.

c. Even if the vessels had been constructed under the Vinson-Trammell Act, Section 496a would not prohibit the use of the excess profits clause used in VS-14.

3. Birnie's Specification of Error is without merit.

B. ARGUMENT.

1. THE COURT BELOW PROPERLY RESOLVED THE LEGAL ISSUE IN FAVOR OF PERMANENTE AS A MATTER OF LAW BECAUSE:
 - a. THE EXCESS PROFITS PROVISION OF VS-14 WAS A VALID AND BINDING CONTRACTUAL PROVISION, PREDICATED UPON SOUND POLICY AND GOOD BUSINESS PRACTICE, AND DESIGNED TO PREVENT EXORBITANT WARTIME PROFIT-MAKING BY COMMISSION SHIPYARD SUBCONTRACTORS.

During the hectic days of wartime ship construction in Commission yards it was not always possible or practical

to determine the approximate cost of subcontract work in advance. Both prime contractors and subcontractors were frequently at a loss to estimate with any degree of accuracy what a particular job might cost under wartime conditions and new and expedited methods of ship construction. Even though subcontracts were usually let upon competitive bidding, there was always the possibility that because of ignorance of actual costs the low bidder might find himself with a profit windfall of exorbitant proportions.

This Court has recognized the necessity under wartime conditions of profit limitation provisions where "because of lack of time for negotiations and the urgency of the times it became impracticable to estimate costs in advance with an exactness which would permit no more than fair profits."

United States v. Bonnell (1950), C.C.A. 9, 180 F. (2d) 145 at 147.

To prevent such excess profits on essential shipyard construction, the Commission recommended the use, by Permanente and other West Coast shipyards working on Commission contracts, of a standard form of Excess Profits Clause in cases where it was difficult to estimate with accuracy the cost of performing a particular subcontract.

In the case of VS-14, because the cost of the work could not be estimated accurately and had not previously been performed by Permanente subcontractors, Permanente included in VS-14, with the knowledge and consent of Birnie, Special Provision 4 for the repayment of excess profits

which Birnie might receive because of uncertainty as to his cost of performance. The intent of the parties as to the effect of the provision is clearly stated in the last paragraph of Special Provision 4 which states “* * * it being understood and agreed that the obligation of the Subcontractor to make payments under this Article is contractual and that such payments shall in effect constitute a reduction of the amount of the contract price which the Contractor is entitled to retain.”

The soundness of the policy of the inclusion of such Excess Profits Clause in such contracts is best attested to by the fact that on a contract with a total contract price of \$430,963.95, performed in approximately 6 months, Birnie realized profits of \$233,587.38, or more than 54% of the contract price.

There can be no question that, in the absence of an express statutory prohibition to the contrary, contracting parties may include in their contract a provision limiting the profits to a certain agreed percentage of the contract price. This is conceded by Birnie as he does not dispute the validity of the contractual provision as such, but claims rather that its inclusion was prohibited by law.

**b. SECTION 496a OF TITLE 34 U.S. CODE WAS NOT APPLICABLE
IN THIS CASE AS A MATTER OF LAW.**

- (1) **The limited effect of Section 496a was to suspend the profit limiting provisions of the Vinson-Trammell Act relating to construction of naval vessels or portions thereof under contract with the Secretary of the Navy.**

The Court's conclusion to this effect is well supported by both common logic and legal precedent.

Section 496a provides as follows:

“The provisions of section 496 of this title, beginning with the first proviso thereof, * * * shall not apply to contracts or subcontracts for the construction or manufacture of any complete naval vessel or any Army or Navy aircraft, or any portion thereof, which are entered into in any taxable year to which the excess profits tax provided in subchapter E of Chapter 2 of Title 26 is applicable or would be applicable if the contractor or subcontractor, as the case may be, were a corporation, and any agreement to pay into the Treasury profit in excess of 10 per centum, 12 per centum, or 8 per centum, as the case may be, of the contract prices of any such contracts or subcontracts shall be without effect. This section shall also apply to such contracts or subcontracts which were entered into before the date of the beginning of the contractor’s or subcontractor’s first taxable year which begins in 1940 and which are not completed before such date. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title IV, §401, 54 Stat. 1003.”

Section 496a appears in Title 34, U.S. Code, relating to “Navy.” It suspends the profit limiting provisions of Section 496 of Title 34, U.S. Code, which is Section 3 of the Vinson-Trammell Act (also commonly known and referred to as The Vinson Act) which relates to construction contracted for by the Secretary of the Navy.

Section 496a was originally enacted as Section 401 of Title IV of the Second Revenue Act of 1940. The title of Section 496a as the section appears in its original form at 54 Stat. 1003 is “Suspension of profit limiting provisions of the Vinson Act.”

The profit limiting provisions of Section 496 which are suspended by Section 496a relate, in the case of vessels, only to contracts "*made by the Secretary of the Navy for the construction and/or manufacture of any complete naval vessel * * *, or any portion thereof.*" Examination of Section 496 shows conclusively that it is limited in effect to such contracts *made by the Secretary of the Navy*. Pertinent portions of Section 496 are as follows:

"§496. Annual estimates; reports of contractors; limitation on profits

The *Secretary of the Navy* is directed to submit annually to the Bureau of the Budget estimates for the construction of the foregoing vessels and aircraft; and there is authorized to be appropriated such sums as may be necessary to carry into effect the provisions of sections 495 and 496 of this title: *Provided*, That no contract shall be made *by the Secretary of the Navy* for the construction and/or manufacture of any complete naval vessel * * *, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees—

(a) To make a report, as hereinafter described, under oath, to the *Secretary of the Navy* upon the completion of the contract.

(b) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the total contract prices, for the construction and or manufacture of any complete naval vessel or portion thereof, * * * of such contracts *within the scope of this section* as are completed by the particular contracting party within the income taxable year, such amount to become the property of the United States,

* * * *Provided*, That if there is a net loss on all *such* contracts or subcontracts for the construction and or manufacture of any complete naval vessel or portion thereof completed by the particular contractor or subcontractor within any income taxable year, such net loss shall be allowed as a credit in determining the excess profit, if any, for the next succeeding income taxable year, * * *, such net loss or deficiency in profit shall be allowed as a credit in determining the excess profit, if any, during the next succeeding four income taxable years, and that the method of ascertaining the amount of excess profit, initially fixed upon shall be determined on or before June 30, 1939: *Provided further*, That if such amount is not voluntarily paid the Secretary of the Treasury shall collect the same under the usual methods employed under the internal-revenue laws to collect Federal income taxes: *Provided further*, That all provisions of law (including penalties) applicable with respect to the taxes imposed by Title I of the Revenue Act of 1934, and not inconsistent with this section, shall be applicable with respect to the assessment, collection, or payment of excess profits to the Treasury as provided by this section, and to refunds by the Treasury of overpayments of excess profits into the Treasury: *And provided further*, That this section shall not apply to contracts or subcontracts for scientific equipment used for communication, target detection, navigation, and fire control as may be so designated *by the Secretary of the Navy*: * * *

* * * * *

(d) That the manufacturing spaces and books of its own plant, affiliates, and subdivisions shall at all times be subject to inspection and audit by any person designated *by the Secretary of the Navy*, the Secre-

tary of the Treasury, and/or by a duly authorized committee of Congress.

(e) * * *

The report shall be in form prescribed *by the Secretary of the Navy* and shall state the total contract price, the cost of performing the contract, the net income, and the per centum such net income bears to the contract price. A copy of such report shall be transmitted to the Secretary of the Treasury for consideration in connection with the Federal income tax returns of the contractor for the taxable year or years concerned.

The method of ascertaining the amount of excess profit to be paid into the Treasury shall be determined *by the Secretary of the Treasury in agreement with the Secretary of the Navy* and made available to the public. * * *''

Section 496 of Title 34 was enacted in 1934 as part of the Vinson-Trammell Act (Act of March 27, 1934; 48 Stat. 503; Sections 494, 495, 496, 497 U.S. Code) dealing with the composition of the Navy. It specifically relates to the construction authorized by Section 495 of Title 34, which, in turn, authorizes the construction of naval vessels to bring the Navy up to treaty strength and confers authority to construct specified vessels for the Navy.

Section 496 is not intended to and does not apply to contracts other than those made with the Secretary of the Navy under the Vinson Act. This has been held by the Circuit Court of Appeals for the Third Circuit in construing the purpose of Section 3 of the Vinson Act (Section 496 of Title 34 U.S. Code). In the case of *Commis-*

sioner of Internal Revenue v. Aluminum Company of America (1944) (C.C.A. 3), 142 Fed. (2d) 663 (Cert. den. 323 U.S. 728, 89 L. Ed. 585), the Court pointed out (142 Fed. (2d) at page 667) that:

“The aim of the provision (Section 496) was to limit the profits on business done in connection with the naval construction *provided for by the Act.*”

The Court further called attention to the intent of Congress to this effect and said (142 Fed. (2d) at page 667):

“In the debate in the Senate on the final passage of the bill, Senator Trammell, who had charge of the bill, said that ‘the very object and purpose of the principal amendment (relating to profit limitations) which the Senate committee has proposed’ is ‘to limit the profits on construction *authorized under this bill.*’”

The Court also stated (142 Fed. (2d) at page 668):

“We think there can be little room for doubt that the purpose of the profit limitation in the Vinson Act was to restrict to ten per cent the profit of anyone furnishing materials or service, worth \$10,000 or more, for intended and designated use in naval construction *authorized by the Act.*”

The Court concluded by saying (142 Fed. (2d) at page 668):

“The evident legislative purpose of the provision can be effectuated fully and uniformly only if the word ‘subcontractor’, as used therein, is construed to embrace anyone who, by contract or order furnishes specified materials for intended and designated use in identified naval construction *authorized by the Act.*”

The Court also called attention to the fact that there were other profit limiting provisions applicable to the Commission and the Army, as distinguished from the provisions of the Vinson Act which were applicable to the Navy (142 Fed. (2d) at page 669).

A number of other decisions and opinions also established that the Vinson Act is intended to apply only to contracts with the Secretary of the Navy:

In *Waterbury Tool Company v. Commissioner* (1943), 2 T.C. 904, the Tax Court said (2 T.C. at page 907):

“The petitioner and the Navy Department in 1935 entered into a contract under the ‘Vinson Act’ of March 27, 1934. That Act in sum provided that contracts entered into *by the Navy Department* * * * should contain provisions by which ‘the contractor’ should agree, *inter alia*, to make a report upon ‘completion of the contract,’ to the *Secretary of the Navy*, and to pay into the Treasury profits above 10 per cent of the total contract price; * * *”

In *Erie Forge Co. v. Commissioner* (Dkt. 2283, Dec. 29, 1945, T.C. Memo. Op. 4 C.C.H. T.C. Memo. Dec. page 1127), the Tax Court said (4 C.C.H. T.C. Memo. Dec. at page 1128):

“Section 3 of the Vinson Act (§496) requires each contractor and subcontractor to pay into the Treasury, all profits in excess of 10 per cent on *Navy Contracts* involving an amount in excess of \$10,000.”

In *Foster-Wheeler Corp. v. Commissioner* (1940), 42 B.T.A. 36, the Board said (42 B.T.A. at page 39):

“Section 3(a) of the Vinson Act as originally enacted in 1934 provided, in substance, that in each

Navy contract the contractor must agree to make a report on each contract to the *Secretary of the Navy* upon completion of the contract; * * *

In *Douglas Aircraft Co. Inc. v. Commissioner* (1942), 46 B.T.A. 1025, the Board said (46 B.T.A. at pages 1030-1032):

“The petitioner in 1935 entered into a contract to construct airplanes for the Navy Department of the United States. At that time the ‘Vinson Act’ of March 27, 1934, provided in short, that one contracting *with the Secretary of the Navy* must contract to make a report to the Secretary upon the completion of the contract, * * *. After much consideration of this question, we are of the opinion that the parties were not free to define in their agreement ‘completion of the contract,’ the expression in the Vinson Act. We think that such act does impose the liability for the excess profits. It is true that the form of the act is not altogether clear in this respect, for the provisions as to liability for profit is found in connection with the enumeration of points to which anyone *contracting with the Secretary of the Navy* must agree.”

The General Counsel for the Commission has rendered an opinion in line with the principles and authorities discussed above and with particular reference to the issue as presented in this litigation by the contention of Birnie. While we appreciate that such opinion is not binding upon this Court, we believe that it presents a very clear and careful analysis of the effect of Section 496a which will be of interest to the Court as an administrative interpretation of the point in issue and we have therefore

reproduced the opinion in full as Appendix A to this brief.

The Attorney General, in an opinion relating to the Vinson Act, dated April 17, 1934, consisting of a letter to the Secretary of the Navy and appearing at 37 Op. of the Atty. Gen. 487, said in part (37 Op. of the Atty. Gen. at page 488):

“Responding to your further inquiry concerning your authority, in cases where it may seem to be administratively desirable, to impose such conditions in connection with contracts not covered by the foregoing statute, it is my opinion that this is entirely dependent upon the provisions of other statutes under which the contracts may be made and to be determined without regard to the provisions of the Act of March 27, 1934 (The Vinson Act). In other words, *the latter Act is to be given no effect beyond its terms by analogy or otherwise.*”

See also the opinion of the Comptroller General (B-25432, 21 Comp. Gen. 1103) containing an answer to a letter from the Chairman of the Commission requesting the Comptroller General's comments upon the capital stock tax as an element of cost in contracts containing profit recapture clauses. The Chairman of the Commission in his letter to the Comptroller General indicates clearly that with respect to these profits limitation provisions, it is the Vinson Act which applies to Navy Department contracts and the Merchant Marine Act of 1936 which applies to Commission contracts.

Furthermore, the Regulations promulgated under the Vinson Act by the Treasury Department (see T.D.

4.906, Internal Revenue Bulletins, 1939-2 C.B. 404), are consistent only with the view that the profit limitation provisions of the Vinson Act are limited to contracts of the Secretary of the Navy.

Section 17.1(c) of these Regulations defines the term "contract" to mean an agreement made by authority of the *Secretary of the Navy* for the construction and/or manufacture of any complete naval vessel.

Section 17.1(d) defines the term "contractor" to mean a person entering into a direct contract with the *Secretary of the Navy* or his duly authorized representative.

Section 17.1(e) defines the term "subcontract" to mean an agreement entered into by one person with another person for the construction of a complete naval vessel, the prime contract for such vessel having been entered into by a contractor and the *Secretary of the Navy* or his duly authorized representative.

It appears to us to be incontrovertible in view of the clear wording of Section 496a and Section 496, the Court and other official interpretations cited above, and the Treasury Department Regulations issued under the Vinson Act and quoted from above, that Section 496a has no other or further effect than to suspend the profit limiting provisions of the Vinson Act and that such profit limiting provisions of the Vinson Act relate only to contracts for the construction of complete naval vessels or portions thereof entered into with the Secretary of the Navy. There has been no tendency or inclination of the Courts, Boards or Administrative Agencies to extend the effect of the profit limitation suspension provisions, but on the con-

trary the tendency has been uniformly to strictly limit such effect.

Birnie, however, and in spite of the clear and abundant authority against his position, seeks to induce this Court to set sail upon an unchartered course and to formulate and adopt a novel interpretation and construction of Section 496a never before attributed to it by any Court, Board, or Administrative Agency. Moreover, he seeks to induce the Court to adopt such novel, extreme and unprecedented construction under most inequitable circumstances, since the effect of doing so would be to permit him to retain, at the expense of the Government, exorbitant and unearned wartime profits amounting to almost a quarter of a million dollars and equal to 54% of the contract price.

(2) Section 401 of the Revenue Act of 1940 (Section 496a) does not have the broad effect ascribed to it by Birnie.

Birnie contends (App's. Op. Br. p. 25) that: "The provisions and meaning of Section 401 of the Revenue Act are clear and definite. The plan or scheme for the regulation of excess profits on military and naval construction of all types which is contained in the Revenue Act of 1940 is likewise clear and definite."

As authority for this statement he calls attention to the House Committee Report (H.R. No. 2894, Seventy-sixth Congress, Third Session, August 28, 1940, Int. Rev. Cum. Bull. 1940-2, page 496), and quotes extensively from the Report (App's. Op. Br. pp. 22-24). Such quotations, together with certain other portions from the report which we will refer to herein, show beyond question that

it was only the profit-limiting provisions of the Vinson-Trammell Act which were suspended by Section 401 and not any profit-limiting provisions relating the Commission construction.

Note the following excerpts from the House Committee report:

“Your committee * * * deems it advisable to stimulate the cooperation of private enterprise in the defense program by suspending the profit limitations of the *Vinson-Trammell Act*, applicable to the construction of naval vessels and Army and Navy aircraft.”

“For these reasons your committee recommends * * * the suspension of the profit limitations *under the Vinson-Trammell Act*.”

“*The provisions of the Vinson-Trammell Act*, as amended, relating to limitation of profit on contracts for the construction or manufacture of naval vessels and Army and Navy aircraft, are suspended * * *.”

“It is not believed that *the limited types of businesses affected by the Vinson-Trammell Act* should be treated * * * differently from the way in which other businesses engaged in production for the national defense are treated.”

Removing any doubt that the committee distinguished between Navy construction and Commission construction is the following excerpt from the same House Committee Report (Int. Rev. Cum. Bull. 1940-2, at page 507):

“The Merchant Marine Act of 1936, as amended, contains provisions relating to the recapture by the Maritime Commission of profits in excess of 10 per cent of the total contract price of contracts and sub-

contracts for ship construction under that Act. It is not believed desirable to suspend these provisions of the Merchant Marine Act since there are commercial considerations involved which do not apply in the case of the Vinson-Trammell Act. Private ship operators for whom vessels are constructed under the construction differential subsidy and charter provisions of the Merchant Marine Act are vitally interested in the cost of such vessels to the Commission. Furthermore, money recaptured by the Commission under ship construction contracts and subcontracts is paid into the Commission's revolving construction fund where it is available for further ship construction and has the effect of reducing the amounts which otherwise would be required to be appropriated from time to time by the Congress for Maritime Commission shipbuilding."

The Senate Committee Report on the same Bill shows also that the Senate Committee likewise distinguished between Navy construction and Commission construction, as is evidenced by the following excerpt from the Senate Committee Report (S.R. No. 2114, Seventy-sixth Congress, Third Session, September 11, 1940, Int. Rev. Cum. Bull. 1940-2, page 528 at page 544):

"Title IV (Title III of the House Bill). Suspension of Vinson-Trammell Act and Certain Provisions of the Merchant Marine Act, 1936.

"In the House bill this was Title III and contained only one section (301) suspending the profit-limiting provisions of the *Vinson Act* * * *. This section has been renumbered section 401 and has been retained * * *.

"Your committee has also added a new section 402 suspending the profit-limiting provisions of the *Mer-*

chant Marine Act, 1936, as to subcontracts, which would otherwise be subject to such Act, entered into by a *corporate* contractor with a *corporate* subcontractor * * *."

Thus it is apparent that both the House and Senate Committees recognized a distinction between Navy construction and Commission construction.

Section 402 of the Revenue Act of 1940 referred to in the Senate Report was adopted by Congress and is set forth as Appendix B hereto. It differs materially from Section 401 of the Revenue Act of 1940 (Section 496a of Title 34, U.S. Code) in that Section 402 only suspends the profit limiting provisions of Commission construction contracts *where both the contractor and the subcontractor are corporations*. Section 402 would be of no benefit to Birnie in this case since Birnie is not a corporation, but is a sole proprietor, and the suspension of profit limitation provision of Section 402 only applies where both the contractor and subcontractor are corporations. It is apparently because Section 402 fails to cover Birnie's situation as a subcontractor under a Commission construction contract, that he seeks to induce the Court to prostitute the effect of Section 401 to do so. Such prostitution of the effect of Section 401 is directly opposed to the clear intent of the House and Senate Committees and Congress that Section 401 would relate only to Navy construction under the Vinson-Trammell Act.

Moreover, Section 496a specifies that the profit limitation suspension provision shall apply in the case of "any complete naval vessel or any Army or Navy Aircraft".

The fact that Army or Navy Aircraft are specifically mentioned rules out any doubt that the provisions should not extend to types of construction not specifically mentioned, such as Commission vessel construction.

(3) Subcontract VS-14 was not a subcontract for the construction of complete naval vessels or portions thereof under the Vinson-Trammell Act.

The Court's finding and conclusion to this effect were fully supported by the evidence and the law.

Subcontract VS-14 shows upon its face that it was entered into under a Prime Contract between Permanente and the Commission designated as Contract No. MCc-15762 (See Article 43 of Terms and Conditions (R. 35)).

Prime Contract No. MCc-15762 likewise shows upon its face that it was a contract with "The United States Maritime Commission." (R. 595). This is conceded by Appellant (App's. Op. Br. pp. 3-4).

The prime contract itself clearly indicates that a distinction was made between the Commission and the Navy. For example see Article 30 (R. 619-620) which provides that:

"30(a) The Contractor shall immediately submit a confidential report to the Navy Department with copies to the Commission or such other Government Agencies as said Department may designate * * *

(b) The Contractor shall, whenever directed by the Navy Department *or* the Commission, submit to the Department any and all information * * *

(c) The Contractor shall refuse to employ * * * any person or persons whom the Commission *or* the

Secretary of the Navy or his duly authorized representatives * * * may designate.”

The above quoted language of Article 30(c) likewise clearly indicates that the Commission did not act as the agent or representative of the Navy since an express distinction was made between the Commission and the Secretary of the Navy or his duly authorized representatives.

It expressly appears from the face of the prime contract that it was not entered into under the Vinson-Trammell Act. Reference to the first “Whereas Clause” on page 1 of the contract discloses that the Commission’s authority for entering into the contract was Public Law 247 and Public Law 630 of the 77th Congress.³ These laws have no connection with the Vinson-Trammell Act, but were Appropriation Acts whereby the Commission received Appropriations for the construction work and under which the Commission entered into the Prime Contract (see next to last paragraph of Opinion of General Counsel for Maritime Commission, Appendix A hereto).

Public Law 247, 77th Congress (55 Stat. 669, Act of August 25, 1941), is entitled “First Supplemental National Defense Appropriation Act of 1942.” It provides in Title III for appropriations to the Commission for the

³“WHEREAS:

1. Under the provisions of Public Law 247 and 630 (77th Congress) the Commission is authorized to construct in the United States, merchant vessels of such type, size and speed as it may determine to be useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries and to produce and procure parts, equipment, material and supplies for such vessels, without advertising or competitive bidding;”

exact purposes specified in the first "Whereas Clause" on page 1 of Contract MCo-15762 (see footnote 3).

Public Law 630, 77th Congress (56 Stat. 392, Act of June 27, 1942), is entitled "Independent Offices Appropriation Act of 1942." It provides for appropriations to the Commission to increase the Commission construction fund established by the Merchant Marine Act of 1936 (Act of June 29, 1936, 49 Stat. 1985; 46 U.S. Code Section 1101 et seq.) and provides that such construction fund shall be available for carrying on the activities and functions which the Commission was authorized to perform under Title III of Public Law 247, *supra*.

Public Laws 247 and 630, just discussed, incorporate by reference Section 4 of Public Law 5, 77th Congress (55 Stat. 5, 46 U.S. Code 1119a, b, 1125a), which section provides in part:

"The Commission is authorized to construct, reconstruct, repair, equip, and outfit, by contract or otherwise, vessels or parts thereof, for any other department or agency of the Government, to the extent that such other department or agency is authorized by law to do so for its own account * * *."

Birnie concedes that the Commission's statutory authority in connection with the vessels contemplated by Prime Contract MCo-15762 is derived from and delimited by Public Law 5 (Apps. Op. Br. p. 30). By such concession he in effect admits that the Commission in constructing the vessels in question operated in accordance with its own functions as a separate instrumentality of the Government, entirely separate and distinct from the Navy Department.

A review of the foregoing statutory authority for the construction work done under Prime Contract MCc-15762 and subcontract VS-14 leads inescapably to the conclusion so aptly expressed by the General Counsel for the Maritime Commission in his Opinion (Appendix A hereto) as follows:

“It is therefore clear that in constructing vessels which incorporated naval defense features or which were turned over to the Navy, the Commission was not in any sense functioning as an instrumentality of the Secretary of the Navy or the Navy Department, but was pursuing its independent functions as specifically delineated by law.

All of the construction undertaken pursuant to prime contract MCc-15762—which included the hulls upon which work was done under subcontracts VS-14 and VS-28—was strictly within the scope of the program assigned to the Maritime Commission, and quite as clearly not within the scope of the Vinson-Trammell Act.”

As demonstrated above, Section 496a only applies to a special category of naval vessels and portions thereof, that is, complete naval vessels and portions thereof constructed under the Vinson-Trammell Act. Therefore, as previously pointed out, appellants attempt to establish that the vessels on which Birnie worked were, or subsequently became, naval vessels, merely injects a false issue into this case. For, even assuming that the vessels in question might or could be shown to come within the dictionary definition of “naval vessels” or the definition of “naval vessels” applied by some court to an entirely different

set of facts, or that the work which Birnie did was on "a portion of a complete naval vessel" under the rationale of a decision or decisions not based on these special facts, this would fall far short of proving that Birnie performed work on naval vessels or portions thereof *constructed under the Vinson-Trammell Act*.

As authority for the proposition that "The work done by Birnie and the equipment installed are clearly a part of a complete vessel within the meaning of the Vinson-Trammell Act," Birnie cites the case of *Pressed Steel Tank Co. v. Commissioner of Internal Revenue* (C.C.A. 7), 133 F.(2d) 776 (App. Op. Br. p. 13). That case is not authority for the above proposition since there the facts involved a contract which was admittedly entered into under the Vinson-Trammell Act for the construction of Navy Destroyers under a contract with the Navy Department, and the only question was whether shells or torpedo heads for such Navy Destroyers were portions of complete naval vessels under the Vinson-Trammell Act. Here, of course, it is contended that the vessels were not constructed under the Vinson-Trammell Act and it would follow therefrom that none of the portions of the vessels were constructed under the Act, even conceding that the work Birnie did was on portions of the vessels.

The other case cited as authority for the same proposition is likewise not authority for the proposition, and for the same reason. The case of *Commissioner of Internal Revenue v. Aluminum Company of America* (C.C.A. 3), 142 F.(2d) 663 (Cert. den. 323 U.S. 728, 89 L.Ed. 585) (Apps. Op. Br. p. 16), also deals with a contract which

was admittedly entered into under the Vinson-Trammell Act with the Navy Department, and where the question was whether or not aluminum supplied for Navy vessels was supplied for the construction of a complete naval vessel under the Act. In fact, this case is the case cited and relied upon by us as the leading authority for the proposition that the application of Section 3 of the Vinson-Trammell Act (Section 496 of Title 34 U.S. Code) is strictly limited to the construction authorized by the Act (see page 15, *supra*).

Furthermore, the Vinson-Trammell Act profit limiting suspension, when it applies at all, only applies to contracts for "the construction or manufacture of any *complete naval vessel*" (or any Army or Navy Aircraft), "or any portion *thereof* * * *" In other words, before the profit limiting suspension can apply, if otherwise applicable, it must appear that the construction contract relates to a complete naval vessel or a *portion of a complete naval vessel*.

It seems quite evident from the plain wording of the suspension provision that in order to avoid the profit limitation provision of the Act, if the Act were otherwise applicable, it would not be enough to show that the construction related to a naval feature of a vessel which was not a *complete* naval vessel, or, as in this case, to a feature of a basic merchant type vessel. Apparently both the basic vessel itself and the feature added to it must be "naval" in character. To hold otherwise would be to render meaningless the term "*complete naval vessel*" as used in the statute.

The evidence in this case established that the basic vessel upon which Birnie performed his subcontract work was a merchant type vessel:

The prime contract refers in the first "Whereas" clause (R. 595) to the authority of the Commission to construct "merchant vessels" * * * "useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries". In the second "Whereas" clause (R. 595) the contract recites that "The Commission has determined that the vessels hereinafter described are of a type, size and speed which will be useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries." Article 2 (R. 596) refers to the vessels as "steel hulled, steam-propulsive powered, cargo carrying vessels". Reference thereafter in the contract is always to "the vessels", "such vessels", or "said vessels", thus relating back to the basic description of the vessels as merchant or cargo carrying vessels. Addendum No. 2 to the contract again refers in the first "Whereas" clause (R. 626) to the original contract for the construction of "seventy-seven cargo vessels". The second "Whereas" clause of Addendum No. 2 (R. 626) states that the Commission has directed the Contractor "to complete twenty-two of *such* vessels" (hulls 552-573) as "combat loaded troop ships" (Design VC2-S-AP5)". Such reference to the cargo vessels and the statement that twenty-two of *such* vessels (i.e. cargo vessels) are to be completed as "combat loaded troop ships" is clear and convincing proof that these AP5 vessels were considered as basically merchant or cargo carrying vessels.

Out of the 77 hulls covered by the prime contract, 45 of the hulls were delivered by the Commission to private operators for Merchant Marine service and only 32 of the hulls were delivered by the Commission to the Navy (R. 681-683). These were all the same basic merchant, cargo carrying vessel construction with certain modifications superimposed on the basic vessel in the case of the hulls which were delivered by the Commission to the Navy (R. 532).

The vessels in question were basically merchant vessels designed for peace time use in the Merchant Marine, with conversion features suitable to equip them as naval auxiliaries in time of war (R. 527-528). The Commission designation of the VC2-S-AP2 (AP2) vessels meant merely Victory Cargo ship, between 400 and 450 feet long, steam propulsion, type AP2 on the Commission schedule of identifying letters (R. 514-515). The Commission's designation of the VC2-S-AP5 (AP5) vessels referred to in Addendum No. 2 to the prime contract, means merely "Victory Cargo ship, between 400 and 450 feet long, steam turbine design, AP 5th modification" (R. 520-521). The designation "AP" in the Commission's designation had no connection with the Navy designation APA, and the similarity in the letters "AP" was occasioned by a peculiar coincidence rather than by intent (R. 514-519, 532-534).

The design for the AP5s was a Commission design (R. 522-527).

The conversion features in the AP5s, which were not in the AP2s, were kept to a minimum so as not to destroy

the value of the vessels for rehabilitation to cargo vessels when the Navy had finished with their use (R. 526). The conversion features were minor and did not affect the basic design (R. 526-527), and many of the vessels have since been restored to merchant cargo vessels (R. 527).

The construction standards for strict Navy construction by the Navy Department were more stringent than the standards prescribed by the Commission and the American Bureau of Shipping for merchant vessels such as the AP2s and AP5s. Such strict Navy construction standards were not followed in the construction of the AP2s and AP5s (R. 571-576, 563-569).

The work that Birnie did on the AP5s substantially all had its counterpart in the AP2 Victory Cargo vessels and was not work of a character which was limited to naval vessels, but on the contrary was commonly found on merchant cargo vessels during wartime. VS-14 called for work by Birnie on degaussing, radar, voice tube, mechanical telegraph, and mechanical wireways. These various items, with the single exception of radar, also had to be installed in substantially the same form on the AP2 cargo vessels (R. 529-532).

Thus the evidence showed that the AP5s were not "complete naval vessels", but were basically merchant cargo vessels with certain modifications commonly found in one form or another on wartime cargo carrying vessels, and that the so-called "naval features" of the AP5s were not exclusively naval in character, but were common to most, if not all, wartime cargo carrying vessels. Therefore, even if the profit limiting provisions of the Vinson-Trammell

Act might otherwise have applied, the evidence showed that the work done by Birnie was not on "complete naval vessels" or "portions of complete naval vessels".

2. THE FOREGOING POINTS SUPPORT THE JUDGMENT AS A MATTER OF LAW. THE REMAINING QUESTIONS RAISED BY BIRNIE ARE ENTIRELY IMMATERIAL.

We contended at the trial of this action, and reaffirm the contention here, that the Court should hold, as a matter of law, based upon the foregoing considerations, that Section 496a was not applicable in this case and that therefore the remaining points raised by Birnie are entirely immaterial. At the trial we entered an objection to all evidence which related to these immaterial matters, that is, to what happened to the vessels after they were delivered to the Commission by Permanente, to what the Navy did with relation to the vessels after it received them from the Commission, and to what was done by the Navy and the Commission before or during the construction of the vessels (R. 254, 255, 262, 263). The Trial Court admitted such evidence under a ruling which leaves some doubt as to whether the Trial Court's decision was based solely upon the legal issue discussed above or whether the Trial Court also considered the evidence on the matters claimed by us to be immaterial and decided the case on the factual as well as the legal issue (R. 263).⁴

⁴"The Court. Well, I am prepared to make my ruling upon these objections that I sense are going to be made by you as the evidence progresses. As I understand it, the crux of the controversy between Permanente and Birnie is whether or not they are naval vessels. I think it is expeditious to receive this evidence, and should I finally decide the case in accordance with Permanente's theory, the implication necessarily would be that I have given no consideration to this evidence to which objection has

We proceed now to a discussion of said immaterial matters raised by Birnie in his brief.

- a. **Section 496a was not made applicable in this case because of the following immaterial matters, claimed by Birnie to render Section 496a applicable:**
- (1) After construction the vessels were ultimately turned over to the Navy by the Commission and were used by the Navy and were treated in some respects as naval vessels.

Birnie stresses in his Opening Brief (Ap. Op. Br. pp. 15-16) that the vessels in question were delivered by the Commission to the Navy, accepted by the Navy, officially commissioned as ships of the Navy, given Navy designations as APA's, given Navy names and numbers, and used by the Navy.

However, since Section 496a only applies to naval vessels constructed under the Vinson-Trammell Act, the question of the use to which vessels not constructed under the Act are subsequently put and the details connected with such use is entirely immaterial. Thus the question of the use to which the vessels were put after Permanente delivered them to the Commission, and whether or not any Navy attributes later attached, turns out to be merely another facet of the false issue mentioned above, and for the same reason.

been made. In that event, of course, no injury would result to the plaintiff from the ruling.

However, there would be a saving of time in resolving the issues in favor of the party who finally prevails, because if I decide in favor of the plaintiff's theory and the reviewing court decrees the judgment should follow the theory for which the defendant contends, the record would be complete. So, for those reasons I am going to overrule the objection you just made and the objections which I sense you intend to make, and receive the evidence. The objection is overruled."

For purposes of illustration, take the case of a private yacht constructed at the cost of its private owner in a commercial shipyard. Assume that the Navy requisitioned this private yacht for war duty, and used the yacht with a Navy crew for purposes of submarine detection or other naval duty, as we understand was actually done in some cases. Assume further that such vessel was commissioned by the Navy, given a Navy designation, number and name, and used by the Navy. While it would be difficult to deny that such yacht, so used, would be used as a "naval vessel," it would be equally difficult to establish that such yacht was a "naval vessel" *constructed under the Vinson-Trammell Act*.

So here, naval use alone, with all of the attendant features mentioned by Birnie, will not convert vessels constructed by the Commission under Public Laws 247 and 630 of the 77th Congress, into naval vessels *constructed by the Secretary of the Navy under the Vinson-Trammell Act*.

Any action on the part of the Navy with relation to these vessels could not in any manner affect the contractual relations between Permanente and Birnie or Permanente and the Commission and could not be binding in any manner upon Permanente, who had no direct contractual relations with the Navy with respect to such vessels. Obviously Permanente had no control over what the Commission might do with such vessels after Permanente completed its contractual obligations with the Commission and delivered the vessels to the Commission, nor did Permanente have any control over what the Navy

might do with such vessels after it acquired them from the Commission, or over what the Navy might show on its records concerning these vessels. These matters were entirely immaterial.

- (2) The vessels had certain conversion features desired and approved by the Navy and ultimately paid for by the Navy.

Birnie likewise stresses in his opening brief (App.'s Op. Br. p. 15) the fact that although the vessels were derived from standard Commission hulls and propulsion machinery, they were converted structurally and especially equipped to the extent necessary for naval use and that the Navy ultimately paid the Commission the cost of such conversion features.

Here again is presented another facet of the previously exposed false issue. For just as the use to which the vessels are put will not convert them into naval vessels *constructed under the Vinson-Trammell Act*, neither will the fact that they contain features requested and approved by the Navy and paid for by the Navy convert them into vessels *constructed under contract with the Secretary of the Navy under the Vinson-Trammell Act*.

Under VS-14 Birnie is obligated to Permanente and not to the Navy. Under the prime contract Permanente is obligated to the Commission and not to the Navy. Birnie was required to perform his obligations under VS-14 to the satisfaction primarily of Permanente and secondarily of the Commission. He had absolutely no contractual obligation to the Navy. Under these circumstances a contract requirement for approval by the Navy of certain

features of the work could not render the work in question naval construction, much less naval construction under the Vinson-Trammell Act.

Actually, as pointed out in the Opinion of the General Counsel for the Commission (Appendix A hereto), Naval approval was required as a matter of law of all vessels which were to be operated by the Navy. The Merchant Marine Act of 1936 (46 U.S. Code, Sections 1101 et seq.; 49 Stat. 1985), by which the Commission was created, recites in its Declaration of Policy (Title I) the purpose of developing a merchant marine "capable of serving as a naval and military auxiliary in time of war or national emergency * * *." Compliance with this policy would require that defense features incorporated in merchant vessels constructed in wartime and presumably for use in the war should be subject to naval inspection and approval. Such approval was also required by Public Law 76, 78th Congress (34 U.S. Code, Section 498d-2; 57 Stat. 156) approved June 17, 1943, which provides in part:

"Notwithstanding the provisions of any other law any vessel intended for operation by the United States Navy, the construction or acquisition and conversion of which was hertofore or is hereafter authorized for the Maritime Commission, the War Shipping Administration, or any other agency of the Government, shall be subject to the approval of the Navy Department in all matters of design and construction or conversion, and the control, custody, and sole right to possession of such vessel shall be transferred to the Navy Department upon the completion of such construction or conversion * * *."

Even though these vessels did contain certain conversion features, they were basically Commission merchant type vessels (see discussion of evidence at pages 30-33 *supra*).

While it is true that the Navy paid the Commission \$34,213,000 for the conversion features only, the total cost of \$89,500,000 was originally paid by the Commission to Permanente (R. 435, 469). Thus the entire cost was paid initially by the Commission and the largest share of the cost was paid ultimately by the Commission.

(3) The Navy eventually acquired legal title to all but one of the vessels.

Birnie also stresses in his Opening Brief (App's. Op. Br. p. 16) that legal title to all but one of the vessels under VS-14 was transferred by the Commission to the Navy on or about January 14, 1946.

The transfer of title to certain of the vessels to the Navy in 1946, almost three years after the prime contract was executed and almost two years after VS-14 was executed, is entirely immaterial in this case and is no evidence whatsoever that the vessels were constructed under the Vinson-Trammell Act.

Even if the question of transfer of title were material, however, the evidence established that the transfer of title was entirely un contemplated by the Commission and the Navy at the time Birnie entered into VS-14 and was worked out almost three years subsequently as a matter of bargaining between the Commission and the Navy and as a part of the overall program of post-war disposition of vessels.

The original arrangement between the Commission and the Navy was that the Commission would retain title to the vessels but would make them available to the Navy for the duration of the emergency on a loan-charter basis (R. 735-741). After the war and as late as December 27, 1945, the Navy Department requested for the first time that the Commission transfer title to certain Commission constructed vessels to the Navy (R. 746-748). Thereafter, and as the result of an agreement between the Commission and the Navy Department involving title to a number of other vessels as well, the Commission agreed to transfer all but one of the vessels under VS-14 to the Navy in return for certain concessions by the Navy as to other vessels which the Commission desired from the Navy (R. 749-750).

This evidence showed that at any time Birnie had any connection with the vessels under VS-14 they were Commission owned and the Navy's subsequent acquisition of title to all but one of them was at the sufferance of the Commission. Such evidence furnished further proof that such vessels were not constructed under the Vinson-Trammell Act, in which event title to the vessels would have been in the Navy at all times.

- b. **Section 396a was not made applicable in this case because of the events leading up to the use of the vessels by the Navy, likewise claimed by Birnie to render Section 496a applicable.**

Birnie contends (App's. Op. Br. p. 17) that "Quite aside from the events leading up to their actual use by the Navy and their physical characteristics, undisputed evidence showed that these vessels were constructed by the Commission for the intended ultimate use of the

Navy pursuant to letter arrangement between the two agencies and because of this ultimate use by the Navy, they are naval vessels as a matter of law.”

In support of this novel and unprecedented theory Birnie cites the “land-grant rate cases” (*Southern Pacific Co. v. Defense Supplies Corp.* (D.C. Cal.) 64 F. Supp. 605, and *Northern Pacific Railway Company v. United States of America*, 330 U.S. 248, 91 L.Ed. 876) as authority for the proposition that the vessels in question were naval vessels as a matter of law. These cases, while adopting a broad view of what constitutes military or naval use and thus giving the government the benefit of the reduced land-grant freight rates on a broad category of freight shipped in war time, certainly do not establish what Birnie must establish in this case, that is, that contracts for the construction of vessels, when made by the Commission, are contracts of the Secretary of the Navy. The land-grant rate cases are concerned only with the effect of the “land-grant allowance” legislation, and not the Vinson-Trammell Act.

This contention is merely another manifestation of the previously exposed false issue, since to prevail in this litigation Birnie must establish not only that the vessels are naval vessels but that they are naval vessels *constructed under the Vinson-Trammell Act*.

As indicated above, we contended at the trial of this action that the chain of correspondence referred to by Birnie in support of this unique claim is entirely irrelevant and immaterial to the simple legal issue here presented, and that the Court should decide, without any

reference to such correspondence, that as a matter of law the vessels were not constructed under the Vinson-Trammell Act (*supra*, p. 33).

Even if evidence of this nature is considered as material, however, it is further proof that the contract for the construction of these vessels was not with the Secretary of the Navy under the Vinson-Trammell Act. Such correspondence further shows conclusively that the vessels construction program was not initiated by the Secretary of the Navy, but rather by the Commission at the request of *The Joint Chiefs of Staff*. It also establishes without question that the vessels were at all times considered as Commission vessels and that they were merely loaned by the Commission to the Navy under an agreement whereby the Commission would retain title to the vessels and they would be returned to the Commission as soon as practical after the termination of the emergency.

As shown by the letter of November 9, 1943 from Admiral William D. Leahy, USN, as Chief of Staff to the Commander in Chief of the Army and Navy, *acting for the Joint Chiefs of Staff*, to Rear Admiral E. S. Land, Chairman of the Commission (R. 724-725), the request for the conversion of these Victory Cargo Ships came not from the Secretary of the Navy, but *from the Joint Chiefs of Staff*. This was the origin of the conversion program, the request *from the Joint Chiefs of Staff*, and any subsequent dealings between the Commission and the Navy Department were merely to give effect to the request of *the Joint Chiefs of Staff*, not the Secretary of the Navy.

In reply to said letter of November 9, 1943, on December 6, 1943 Admiral E. S. Land, Chairman of the Commission, wrote to the Secretary of the Navy and referred to the request of the *Joint Chiefs of Staff* for the Commission to construct such vessels and confirmed the fact that the conversion of AP2S and AP3S would be in accordance with contract plans and specifications to be furnished by the Commission and working plans to be prepared by George Sharp, Naval Architect (R. 726-727).

In a letter dated December 10, 1943 from the Bureau of Ships to the Chairman of the Commission, referring further to the letter of December 6, 1943, reference is made to the fact that the ships were to be built on Victory Ship hulls, the contract plans and specifications were to be furnished by the Commission and the working plans were to be prepared by George Sharp, Naval Architect (R. 730-732).

On February 29, 1944 the Secretary of the Navy in a letter to the Chairman of the Commission confirmed the arrangement mentioned above whereby the Navy agreed to accept the vessels on a loan-charter basis from the Commission for the duration of the emergency, whereby the Commission agreed to transfer the control, custody and sole right of possession of the vessels to the Navy, and the Navy agreed to return the vessels to the Commission as soon after the termination of the emergency as circumstances and conditions would permit without further act or deed (R. 735-741).

On April 14, 1944, General G. C. Marshall, for the *Joint Chiefs of Staff*, in a letter to the Chairman of the

Commission again referred to the original letter of November 6 (November 9), 1943 *from the Joint Chiefs of Staff* whereby *the Joint Chiefs of Staff* requested the Commission to construct the 130 APA's, and modified the earlier letter by diverting 6 of the hulls for conversion by the Navy to hospital ships. This letter is further evidence that *the Joint Chiefs of Staff*, rather than Secretary of the Navy, initiated and controlled the conversion program (R. 689-690).

On April 25, 1944 the Chairman of the Commission, by letter, called the attention of the Secretary of the Navy to the requirements of Public Law 204, 77th Congress (57 Stat. 604), approved December 17, 1943, which provided in part:

“* * * no sums expended by the Maritime Commission from funds appropriated to it for the construction of vessels which are transferred to the Navy shall be reimbursed from naval appropriations, except to the extent of agreements existing on the effective date of this Act; Provided, further, that vessels acquired by the Navy from the Maritime Commission without reimbursement shall not be disposed of except by return to the Maritime Commission.”

and requested the Navy to confirm its agreement to an arrangement worked out between the Commission, the War Shipping Administration and the Navy, which would effectuate the policy of Public Law 204 (Pltfs.' Ex. HH, Ex. P to Deposition of R. L. McDonald).⁵

⁵This exhibit was omitted from the Transcript of Record by stipulation with the understanding that it could nevertheless be considered as an exhibit. See Stipulation Shortening Contents of Printed Book of Exhibits (R. 587).

Attached to the letter was a Memorandum of Agreement dated 9 March 1944 which sets forth under 2. the arrangements as to "Merchant vessels constructed by the Maritime Commisison with its funds for operation by War Shipping Administration and delivered to the Navy by the Maritime Commission or War Shipping Administration (for manning and operation)." This arrangement, applicable to the vessels in question, specified that the Commission would not be reimbursed for its construction costs but would be reimbursed by the Navy for the cost of conversion work and delivery costs and for special materials and equipment furnished by the Navy, and further that the vessels would be delivered by the Commission to the Navy on a loan-charter basis and without transfer of title.

On May 25, 1944 the Secretary of the Navy by letter to the Chairman of the Commission agreed to the terms of the Memorandum of Agreement dated 9 March 1944 enclosed in the letter of 25 April 1944 (R. 691).

On June 3, 1944 the Chairman of the Commission wrote to the Secretary of the Navy and again referred to the previous request of the *Joint Chiefs of Staff* and requested the Navy to agree to reimburse the Commission for any and all expenses incurred in any manner in connection with the delivery and conversion features of the vessels at the request of the Navy. He required Navy approval of this request as an additional condition for the transfer of the vessels (R. 742-744).

On July 3, 1944 the Secretary of the Navy wrote to the Chairman of the Commission and agreed to such addi-

tional condition for the transfer of the vessels (R. 744-745).

In the foregoing documents is convincing proof that *the Joint Chiefs of Staff*, not the Secretary of the Navy, initiated the conversion program; that the Commission, not the Secretary of the Navy, constructed the vessels; that the Commission, not the Navy Department, was originally scheduled to retain title to the vessels; that the Commission transferred possession of the vessels to the Navy Department on a loan-charter basis only and subject to the obligation of the Navy Department to return the vessels to the Commission; and that the Commission was reimbursed by the Navy Department for certain features only under Public Law 204, 77th Congress, and not under or by virtue of the Vinson-Trammell Act.

- c. **Even if the vessels had been constructed under the Vinson-Trammell Act, Section 496a would not prohibit the use of the excess profits clause used in VS-14.**

Section 496a suspends the profit limitation provisions of Section 496, that is profit limitations which require an agreement to pay *into the Treasury excess profit as determined by the Treasury Department* under specified contracts performed during the income tax year, and provided that if the excess profits are not voluntarily paid into the Treasury the Secretary of the Treasury shall collect them under the usual methods employed under the internal-revenue laws to collect Federal income taxes.

Special Provision 4 of VS-14 would not violate the requirement of Section 496a even if the vessels in ques-

tion had been constructed under the Vinson-Trammell Act. Special Provision 4 does not require any payment *into the Treasury* as required by Section 496, nor does it provide for the determination of excess profits *by the Treasury Department*, nor does it provide for collection of unpaid excess profits by the Secretary of the Treasury under the usual methods employed under the internal revenue laws to collect Federal income taxes. If that type of provision were involved in this case there would obviously be no necessity for an action of this kind, as the Secretary of the Treasury would merely collect the excess profits as he would collect unpaid income tax.

Special Provision 4 provides, on the contrary, for the payment of excess profits under a single specified contract, as determined by the Commission, to a private contractor, Permanente, for the benefit of the Commission, and without collection of such excess profits in the same manner as Federal income taxes are collected. It is true, as stipulated by Permanente and the Commission that Permanente will pay to the Commission the excess profits recovered in this action as a matter of contract between Permanente and the Commission. Such payment to the Commission, however, is not in any sense a payment into the Treasury but rather would go to the Commission to be used in the performance of its functions as delineated by law. (See to this effect excerpt from House Committee Report (H.R. No. 2894, Seventy-sixth Congress, Third Session, August 28, 1940, Int. Rev. Cum. Bull., 1940-2 at page 507, set forth *supra* at pages 21-22).)

Moreover, Section 496 sets up as a matter of *statute* a particular kind of profit limitation provision which was required by law to be incorporated in every contract of

the Secretary of the Navy under the Vinson-Trammell Act. Special Provision 4 of VS-14 is not that kind of profit limitation provision, but is *contractual* rather than statutory and the last clause of Special Provision 4 so states as follows:

“ . . . it being understood and agreed that the obligation of the Subcontractor to make payments under this Article is contractual and that such payments shall in effect constitute a reduction of the amount of the contract price which the Contractor is entitled to retain.”

3. BIRNIE'S SPECIFICATION OF ERRORS IS WITHOUT MERIT.

Birnie specified 5 alleged errors in the Trial Court's Findings of Fact (App. Op. Br. pp. 6-7).

As to Specifications 1 and 2, as indicated above (p. 33, f.n.4) there is doubt as to whether the Trial Court considered the factual matters involved in a determination of whether VS-14 was a contract for the construction of complete naval vessels or portions thereof. However, there is abundant evidence in the record and discussed above to support these findings. (See pp. 24-33 hereof.)

As to Specifications 3 and 5, these findings to the effect that it was the Commission and not the Secretary of the Navy who made the contracts, are abundantly supported by the evidence. (See pp. 24-27 hereof.)

As to Specification 4, the finding that Permanente performed all acts and things required on its part to be done and performed under VS-14, Birnie stipulated that Permanente had so performed except for the payment of the money claimed to be due to Birnie from Permanente (R. 190).

The remaining Specifications of Error all relate to the Trial Court's Conclusions of Law. These specifications thus involve only the legal issues discussed above and which the Trial Court properly resolved in favor of Birnie.

CONCLUSION.

Birnie, unsatisfied with a legitimate and reasonable profit, seeks to have this Court depart from sound legal precedent and common logic in order to reach a most inequitable result—a result which would release him retroactively and unfairly from his binding and legal contractual commitment to return excess profits in excess of 10% of the contract price. The Trial Court quite properly rejected this unsound and inequitable effort. We respectfully submit that, in view of the reasons set forth above, this Court should do likewise and should affirm the judgment of the District Court against appellant Birnie.

Dated, San Francisco, California,
June 20, 1951.

Respectfully submitted,

BRUCE WALKUP,

WILLIS S. SLUSSER,

THELEN, MARRIN, JOHNSON & BRIDGES,

Attorneys for Appellee,

The Permanente Metals Corporation.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

UNITED STATES MARITIME COMMISSION

Washington

January 31, 1947

Thelen, Marrin, Johnson & Bridges, Esqs.

111 Sutter Street

San Francisco 4, California

Attention: Mr. Bruce Walkup

Dear Sirs:

The Permanente Metals Corporation—Richmond
Shipyard Number Two vs. Birnie Electric Company

I have your letter of January 21, 1947, requesting my opinion as to the validity of the profit limitation provisions in subcontracts Nos. VS-14 and VS-28 between Permanente Metals Corporation and Birnie Electric Company. Both subcontracts were awarded under prime contract MCo-15762 between Permanente Metals Corporation and the Maritime Commission.

The profit limitation provisions were identical in both subcontracts and, insofar as material to your question, provided:

“SPECIAL PROVISIONS:

IV. *Report of Cost—Excess Profits:*

The subcontractor agrees to account for and pay to the contractor certain profits derived under this contract, and for such purposes agrees:

* * * * *

(b) To pay to the contractor profit as shall be determined by the Commission in excess of ten (10) per cent of the total contract price which

amount shall become the sole property of the Commission."

Your letter states that the subcontractor asserts that the foregoing provision is invalid under the amendment to the Vinson-Trammell Act (34 U.S. Code Sec. 496a; 54 Stat. 1003) which provides:

"Sec. 496a. Same; suspension of profit limiting provisions

"The provisions of section 496 of this title, as amended, beginning with the first proviso thereof, and section 2(b) of the Act of June 28, 1940 (c. 440, 54 Stat. 676, Public, Numbered 671, Seventy-sixth Congress, third session), shall not apply to contracts or subcontracts for the construction or manufacture of any complete naval vessel or any Army or Navy aircraft, or any portion thereof, which are entered into in any taxable year to which the excess profits tax provided in subchapter E of Chapter 2 of the Internal Revenue Code is applicable or would be applicable if the contractor or subcontractor, as the case may be, were a corporation, and any agreement to pay into the Treasury profit in excess of 10 per centum, 12 per centum, or 8 per centum, as the case may be, of the contract prices of any such contracts or subcontracts shall be without effect. This section shall also apply to such contracts or subcontracts which were entered into before the date of the beginning of the contractor's or subcontractor's first taxable year which begins in 1940 and which are not completed before such date."

In my opinion, this statute has no bearing upon the profit limitation provisions of subcontracts VS-14 and VS-28. I regard those provisions as wholly valid.

Section 496a of Title 34 of the U. S. Code must be read in its proper context. It constitutes an amendment of the Act of March 27, 1934 (48 Stat. 503) which related to the composition of the Navy, and adopted for the first time the statutory principle that profits derived from naval construction under the act should be regulated by law.

The profit limitation provision of the Vinson-Trammell Act is Section 496 of Title 34 of the U.S. Code, which provides in part:

“Sec. 496. *Annual estimates; reports of contractors; limitation on profits*

“The Secretary of the Navy is directed to submit annually to the Bureau of the Budget estimates for the construction of the foregoing vessels and aircraft; and there is authorized to be appropriated such sums as may be necessary to carry into effect the provisions of sections 495 and 496 of this title: Provided, That no contract shall be made *by the Secretary of the Navy* for the construction and/or manufacture of any complete naval vessel or aircraft, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees—

* * * * *

“(b) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the total contract prices, for the construction and or manufacture of any complete naval vessel or portion thereof * * *.”

The words which I have italicized in the foregoing quotation indicate that the profit limitation provisions of

Section 496 relate solely to contracts made by the Secretary of the Navy. Section 496a, suspending the profit limitation provisions of Section 496, constitutes, by its own terms, a limitation of the scope of Section 496. It has no other or further effect. Since Section 496 establishes a rule of profit limitation as to contracts made by the Secretary of the Navy, and since Section 496a suspends those profit limitations, the suspension effected by Section 496a is operative only with respect to contracts made by the Secretary of the Navy. Consequently, Section 496a is in no way applicable to the contracts of the Maritime Commission, or to subcontracts thereunder.

If any support other than the plain language of the statute is needed to support this conclusion, it is found in the title of Section 496a as the section appears in its original form at 54 Stat. 1003. It was enacted as Section 401 of Title IV of the Second Revenue Act of 1940. The caption of Section 401 is "*Suspension of profit limiting provisions of the Vinson Act.*" From this language it is apparent that no profit limitation provisions other than those of the Vinson Act were suspended by Section 401.

My conclusion as to the validity of the disputed provisions in the subcontracts is not affected by the circumstance that other provisions in the agreements required specified items of work to be approved by the United States Navy. Such requirements as these fall far short of transforming a Maritime Commission contract into a Navy contract. The Merchant Marine Act, 1936 (46 U.S.C. Sections 1101, et seq.) recites in its declaration of policy the purpose, among others, of developing a merchant marine "capable of serving as a naval and

military auxiliary in time of war or national emergency * * *.” Compliance with this policy obviously requires that defense features incorporated in merchant vessels constructed in wartime and presumably for use in the war should be subject to naval inspection and approval. The provisions for Navy approval, however, were required not merely as a matter of policy prescribed by the Merchant Marine Act, 1936, but as a matter of specific statutory duty, in consequence of Public Law 76, 78th Congress (34 U.S.C. Sec. 498d-2; 57 Stat. 156), approved June 17, 1943, which provides in part:

“Notwithstanding the provisions of any other law any vessel intended for operation by the United States Navy, the construction or acquisition and conversion of which was heretofore or is hereafter authorized for the Maritime Commission, the War Shipping Administration, or any other agency of the Government, shall be subject to the approval of the Navy Department in all matters of design and construction or conversion, and the control, custody, and sole right to possession of such vessel shall be transferred to the Navy Department upon the completion of such construction or conversion * * *.”

This provision applies to work done under subcontracts VS-14 and VS-28 since both were executed after the effective date of the enactment.

Prior to the enactment of Public Law 76, 78th Congress, the Commission had been authorized by Public Law 5, 77th Congress (55 Stat. 5) to perform work for other Government agencies and departments. Section 4 of that act provided in part:

“The Commission is authorized to construct, reconstruct, repair, equip, and outfit, by contract or otherwise, vessels or parts thereof, for any other department or agency of the Government, to the extent that such other department or agency is authorized by law to do so for its own account * * *.”

This provision was incorporated by reference in Public Law 247, 77th Congress (55 Stat. 669, 681—“First Supplemental National Defense Appropriation Act, 1942”) and Public Law 630, 77th Congress (56 Stat. 392—Independent Offices Appropriation Act, 1943”) which were the appropriation acts under which the Commission entered into Contract MCo-15762, this being the prime contract pursuant to which subcontracts VS-14 and VS-28 were awarded. It is therefore clear that in constructing vessels which incorporated naval defense features or which were turned over by the Commission to the Navy, the Commission was not in any sense functioning as an instrumentality of the Secretary of the Navy or the Navy Department, but was pursuing its independent functions as specifically delineated by law.

All of the construction undertaken pursuant to prime contract MCo-15762—which included the hulls upon which work was done under subcontracts VS-14 and VS-28—was strictly within the scope of the program assigned to the Maritime Commission, and quite as clearly not within the scope of the Vinson-Trammell Act.

Very truly yours,

WADE H. SKINNER,

General Counsel

Appendix B

SECTION 402 OF THE REVENUE ACT OF 1940 (ACT OF OCTOBER 8, 1940; 54 Stat. 965)

“SEC 402. SUSPENSION OF PROFIT-LIMITING PRO- VISIONS OF THE MERCHANT MARINE ACT, 1936, AS TO CERTAIN SUBCONTRACTS

“(a) The provisions of section 505(b) of the Merchant Marine Act of 1936, as amended, shall not apply to any subcontract which would otherwise be within such provisions if such subcontract is entered into in any taxable year of the subcontractor to which Subchapter E of Chapter 2 of the Internal Revenue Code is applicable and if the principal contractor and the subcontractor between which such subcontract is entered into are not affiliated within the meaning of subsection (b) of this section at the time such subcontract is entered into or at any time thereafter up to and including the date of its completion; and any agreement, pursuant to which the subcontractor is required to pay to the United States Maritime Commission profit in excess of 10 per centum of the contract price of any such subcontract or pursuant to which such an agreement is required to be obtained from such subcontractor relative to such subcontract, shall be without effect. This subsection shall apply only if both the principal contractor and the subcontractor are corporations.

“(b) For the purposes of this section, two or more corporations shall be deemed to be affiliated (1) if one corporation owns at least 95 per centum of the stock of

the other or others, or (2) if at least 95 per centum of the stock of two or more corporations is owned by the same interests. As used in this subsection, the term 'stock' does not include nonvoting stock which is limited and preferred as to dividends."

No. 12766

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN URQUHART BIRNIE, an individual doing business as
BIRNIE ELECTRIC COMPANY, and MASSACHUSETTS
BONDING AND INSURANCE COMPANY, a corporation,
Appellants,

vs.

THE PERMANENTE METALS CORPORATION, a corporation,
and UNITED STATES MARITIME COMMISSION,
Appellees.

Reply Brief on Behalf of Appellant, John Urquhart
Birnie, an Individual Doing Business as Birnie
Electric Company.

HILL, FARRER, & BURRILL,
ELLIOTT H. PENTZ,

411 West Fifth Street,
Los Angeles 13, California,

Attorneys for Appellant John Urquhart Birnie.

TOPICAL INDEX

	PAGE
Preliminary statement	1
Argument	2

I.

Naval vessels are naval vessels regardless of who builds them ; and the purpose of both the Vinson-Trammel Act and the Revenue Act of 1940 would be nullified were those acts limited only to contracts in which the Secretary of the Navy appear as a party signatory.....	2
---	---

II.

The effect of Public Law 5 and Section 4 thereof is to make the Maritime Commission subject to the same restrictions on its authority as is the United States Navy.....	7
Conclusion	8

TABLE OF AUTHORITIES CITED

CASES	PAGE
Commissioner of Internal Revenue v. Aluminum Company of America, 142 F. 2d 663.....	2, 3, 4
Northern Pacific Railway Co. v. United States of America, 330 U. S. 248, 91 L. Ed. 867.....	3, 4
Pressed Steel Tank Co. v. Commissioner of Internal Revenue, 133 F. 2d 716.....	2, 4
Southern Pacific Company v. Defense Supplies Corp., 64 Fed. Supp. 607	3

STATUTES

Public Law 5	7, 8
Public Law 247.....	7
Public Law 630.....	7
Revenue Act of 1940, Sec. 401.....	1, 2, 4, 5, 6

No. 12766

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN URQUHART BIRNIE, an individual doing business as
BIRNIE ELECTRIC COMPANY, and MASSACHUSETTS
BONDING AND INSURANCE COMPANY, a corporation,
.

Appellants,

vs.

THE PERMANENTE METALS CORPORATION, a corporation,
and UNITED STATES MARITIME COMMISSION,

Appellees.

Reply Brief on Behalf of Appellant, John Urquhart
Birnie, an Individual Doing Business as Birnie
Electric Company.

Preliminary Statement.

Permanente has placed its case squarely upon the single proposition that Birnie must fail because the Prime Contract was not executed by the Secretary of the Navy.

Regarding the effect of Section 401 of the Revenue Act of 1940, the question has become whether the sort of vessel constructed is determinative of that section's applicability, or whether, on the contrary, the formal party signatory to the prime contract under which the vessels were constructed is the final criterion.

ARGUMENT.

I.

Naval Vessels Are Naval Vessels Regardless of Who Builds Them; and the Purpose of Both the Vinson-Trammel Act and the Revenue Act of 1940 Would Be Nullified Were Those Acts Limited Only to Contracts in Which the Secretary of the Navy Appear as a Party Signatory.

Permanente does not actively dispute the claim of Birnie that the vessels in question were constructed to fill Navy needs, were delivered to the Navy, were used by the Navy in the prosecution of the war. In passing, it accepts these matters. It says, however, that they make no weight in this litigation because the prime contract under which the vessels were constructed was not signed by the Secretary of the Navy and that the Vinson-Trammel Act and the suspension thereof contained in Section 401 of the Revenue Act of 1940 are applicable only to cases where the prime contracts are signed personally by the Secretary of the Navy.

In so far as the Vinson-Trammel Act is concerned, this is an unduly and unwarrantedly narrow construction. The *Pressed Steel Tank* case (*Pressed Steel Tank Co. v. Commissioner of Internal Revenue*, 133 F. 2d 716) shows that, in so far as the applicability of the Act depended upon the sort of work done, the Act has been given no narrow construction. The *Aluminum Company* case (*Commissioner of Internal Revenue v. Aluminum Company of America*, 142 F. 2d 663) shows that, in so far as

the applicability of the Act depended upon the form or classification of the contract for work, the Act has been given no narrow construction. The Treasury Regulations, issued pursuant to the Act, and approved in the *Aluminum Company* case, push the applicability of the Act to its uttermost limits in their inclusion of materialmen as subject to the Act.

True enough, the cited cases, the other cases cited in Permanente's Brief, and the Regulations have reference to contracts with the "Secretary of the Navy". However, the contracts in all those cases and the Regulations greatly antedate the late great war, the tremendous naval expansion necessarily incident thereto, and the emergency methods of fulfilling the needs of national defense. References in those cases and in those Regulations, made in quieter days, to the Secretary of the Navy, are by no means applicable to the hectic days of national emergency nor to times when the problem was getting things done, not the formal manner in which they were done.

Such is the meaning, and the pertinence to this case, of the *Northern Pacific* (*Northern Pacific Railway Co. v. United States of America*, 330 U. S. 248, 91 L. Ed. 867) and *Southern Pacific* (*Southern Pacific Company v. Defense Supplies Corp.*, 64 Fed. Supp. 607) cases. There the argument of formalism was urged; the shipments in question were not consigned to or shipped by Army or Navy authorities. The Supreme Court in the *Northern Pacific* case specifically rejected such an argument. It held that the applicability of the land-grant statute de-

pended upon the realities of the situation, upon whether the property was actually destined for actual use by the military or naval forces. The profit limiting provision of the Vinson-Trammel Act was, and still is, like the land-grant statute, a provision for the benefit of or protection to the Government.

The profit limiting provision of the Vinson-Trammel Act speaks for itself, is so far as its meaning and purpose is concerned. It limits profits on naval construction so that the building of the United States Navy shall not afford a source for the making of what Congress has declared to be excessive profits. It is not consistent with that meaning and purpose to confine the applicability of the profit limiting provision only to Naval Construction contracts to which the Secretary of the Navy alone was a party signatory, and to no others. Neither the *Pressed Steel Tank* case, nor the *Aluminum Company* case, nor the *Northern Pacific* case, support such a narrow interpretation.

The House Committee which prepared and presented for Congressional approval Section 401 of the Revenue Act of 1940 shows, in its report, that the Vinson-Trammel Act was not regarded as having any narrow effectiveness. Its report shows that the Act was considered to be applicable to "naval construction" without limitation. Likewise, the report shows that the general applicability of the Act to naval construction was proving a hindrance to a naval construction program. The enterprising builder, constructor, or manufacturer could do better profitwise in

other fields of endeavor, even though in the fields of national defense. Finally, the report shows that Section 401 was designed to accomplish two purposes: First, to remove the hindrance to naval construction which the Vinson-Trammel Act was proving to be; second, to place everyone, taxwise, on the same footing, whether his income arose from public or private contracts. It was no longer to be a forbidden thing to make more than ten per cent profit on naval construction; but such profits as the naval constructor might make were to be subject to the general wartime tax rates and thus no one gain unfair advantage.

Section 401 of the Revenue Act of 1940, while codified in Title 34 of the U. S. Code, is not an amendment to the Vinson-Trammel Act. It is simply and solely a provision of that Revenue Act having for its purpose the suspension for a time of the Vinson-Trammel Act, and the prohibition for a time of the profit-limiting scheme there provided for.

Just as much as the Vinson-Trammel Act specified the policy of Congress in respect to naval construction for the period from 1934 to 1940 and for years subsequent to 1945, so does the Revenue Act of 1940 specify the policy of Congress in respect to naval construction for the period with which we are here concerned.

That policy and the resultant rule is that any agreement to pay into the Treasury profit in excess of ten per cent "shall be without effect."

Here are vessels built to fill urgent needs of the United States Navy, delivered to the United States Navy, commissioned by the United States Navy, used by the United States Navy for months of wartime activity, and still in the possession of the United States Navy, except for two. Some \$34,000,000 of Navy funds went into their construction.

Permanente would have it that all this is not germane, is wholly immaterial, because the prime contract does not show the Secretary of the Navy as the party signatory. Looked at to determine the applicability of the profit-limiting provision of the Vinson-Trammell Act, it would seem clear beyond doubt that this was the very type and kind of construction the Act was meant to cover. Looked at to determine the applicability of Section 401 of the Revenue Act of 1940, it would seem clear beyond doubt that this was the very type and kind of construction into which it was intended to encourage builders to enter by suspending the Vinson-Trammell Act. It cannot realistically be important who was the formal party signatory to the prime contract.

II.

The Effect of Public Law 5 and Section 4 Thereof Is to Make the Maritime Commission Subject to the Same Restrictions on Its Authority as Is the United States Navy.

Permanente does not, and a reading of the statute will show that it cannot, urge that these vessels were built pursuant to the authority granted to the Maritime Commission in the Merchant Marine Act of 1936. The authority of the Commission is declared in Prime Contract MCc-15762 to be Public Laws 247 and 630, both of which are appropriation acts.

Permanente says that those two laws, through their adoption of Public Law 5, show that the Commission in constructing the vessels in question operated in accordance with its own functions as a separate instrumentality of the government, entirely separate and distinct from the Navy Department.

But Permanente, through silence, avoids facing the clear and important meaning of Public Law 5, wherein the Commission is authorized to construct and repair and outfit vessels for any other department or agency of the government *to the extent that such other department or agency is authorized by law to do so for its own account.*

In the trial court and again before this Honorable Court, Permanente has shunned it. This continuing evasion reflects its inability to furnish an answer to this implicit dictate of the statute. Again we say that if the Secretary of Navy was without authority to require the inclusion of the ten per cent recapture clause, and had the Secretary of Navy included the same it would have been without effect, then neither the Commission nor Permanente had authority to include this recapture clause, and

in so doing the same was without effect. Certainly, neither the Commission nor Permanente stands in any better position than the Secretary of Navy with regard to Special Provision No. 4. To conclude otherwise is to avoid the manifest and unmistakable limitation of the Commission's authority as contained in Public Law 5.

Conclusion.

Again, we respectfully submit that this Court should reverse the judgment of the District Court and direct that judgment be entered in favor of Birnie. In closing, we makes this answer to the protestations of Permanente against war profiteering. The Department of Internal Revenue is well able to take care of the matter of excessive profits. Indulging in an understatement, its high surtaxes were and indeed still are adequate. Birnie seeks to avoid discrimination against builders of naval ships which would otherwise result should Permanente's contentions prevail, and which would, we submit, be in direct violation of the clear dictates of Congress that such discrimination should not occur. Birnie seeks to apply against these profits such of his losses as are applicable. This is a privilege enjoyed by all others engaged in the war effort and to which, we respectfully submit, he is likewise entitled.

Respectfully submitted,

HILL, FARRER, & BURRILL,

By ELLIOTT H. PENTZ,

Attorneys for Appellant John Urquhart Birnie.

